Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE DIOCESE OF COLORADO, A COLORADO CORPORATION, AND BISHOP WILLIAM FREY,
Petitioners,

v.

MARY E. MOSES, n/k/a MARY ELAINE TENANTRY,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Colorado

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Colorado Supreme Court—which upheld various tort claims against petitioners, rejecting their First Amendment defenses entirely on the basis of *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990)—should be required to assess the impact of the newly enacted Religious Freedom Restoration Act, which requires burdens on the free exercise of religion to be justified by a compelling state interest and which applies, by its terms, to "all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act."

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PETITION FOR A WRIT OF CERTIORARI

Petitioners ask that the Court issue a writ of certiorari to review the judgment of the Colorado Supreme Court in this case.[1]

OPINION BELOW

The only opinion below is the opinion of the Supreme Court of Colorado, which is reported at 863 P.2d 310. It is reprinted in the Appendix to this Petition at Pet. App. 1a-52a.

JURISDICTION

The Supreme Court of Colorado entered its judgment on November 15, 1993, and a timely petition for rehearing was denied on December 6, 1993. Pet. App. 57a.

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[1] The sole party in the courts below, other than those listed in the caption, was Father Paul Robinson. The Diocese of Colorado is a Colorado corporation with no parent corporations or non-wholly-owned subsidiaries.

Justice Ginsburg granted a motion to extend the time for filing this petition until April 6, 1994. Pet. App. 58a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

The Religious Freedom Restoration Act, Pub. L. No. 103-141, § 3, 107 Stat. 1488 (1993), is reprinted at Pet. App. 59a-62a.

STATEMENT

This case involves various tort claims asserted against petitioners, the Episcopal Diocese of Colorado and Bishop William Frey. Respondent, a member of a church located in the Diocese, alleged that she had gone to see a priest, Father Paul Robinson, for pastoral counseling, that they had entered into a sexual relationship during these sessions, and that after the termination of this relationship she suffered a relapse of a preexisting psychiatric illness. Pet. App. 6a, 11a. Her claim directly against Father Robinson was stayed when he declared bankruptcy, but she proceeded against the Diocese and Bishop Frey on the theory that they had been negligent in hiring and supervising Father Robinson and that Bishop Frey had breached his fiduciary duty to respondent by failing to respond appropriately when he undertook to resolve the issues arising from Father Robinson's conduct. The trial court entered judgment for respondent in the amount of $1,743,045.10, and the Colorado Supreme Court, rejecting petitioners' First Amendment defenses, affirmed the bulk of the judgment. Pet. App. 11a-12a.

At trial, the evidence showed that Father Robinson was hired as an assistant priest by the St. Philip and St.

James Episcopal Church in 1984 and that respondent soon thereafter began meeting with him for pastoral counseling. Over time, these sessions began to include kissing, mutual fondling, and ultimately oral sex. Pet. App. 6a. When respondent's husband later learned of the affair, he confronted the rector of the church, Father Meyers, and this meeting led to a further meeting involving the husband, Father Robinson, Father Meyers, and Bishop Frey. At that meeting, Father Robinson admitted his relationship with respondent, and respondent's husband agreed to let the Bishop decide what actions needed to be taken. Bishop Frey later told Father Robinson that he would not prevent his promotion to rector at another church if Robinson would agree not to repeat this conduct and would seek counseling. Pet. App. 9a-10a.

Bishop Frey met two days later with respondent. Expressing feelings of guilt over the affair, she made a confession, and the bishop granted her absolution. Respondent stated that she did not want to hurt Father Robinson, and the bishop indicated that it would be best for all concerned if she did not tell anyone about her relationship with him. Respondent then obtained permission to talk with her husband, a priest or a counselor about this matter. Pet. App. 10a-11a.

Several years later, respondent had a chance meeting with Father Robinson in the hallway of a hospital. Her husband became upset when he learned about this encounter, and the couple ultimately divorced. Respondent's mental health then deteriorated to the point where she lost her business and required extensive psychiatric care. Pet. App. 11a.

Respondent premised her claim of negligent hiring and supervision on psychological reports in Father Robinson's file maintained by the Diocese. These reports indicated that Father Robinson had problems with depression, low self-esteem, "sexual identification ambiguity," and authority. Pet. App. 5a. Respondent contended that this material was enough to put petitioners on notice that he

was unqualified to serve as an assistant priest or required close monitoring. The breach of fiduciary duty claim was based on what Bishop Frey said and did not say in his meeting with respondent after the affair had ended. He was faulted for allowing her to continue to blame herself for the affair, for asking her to maintain secrecy, and for failing to make inquiries or recommendations about how she planned to deal with the stress of the situation. Pet. App. 21a-22a.

Respondent prevailed on these claims in a jury trial,[2] and petitioners appealed, arguing that these tort judgments constituted unconstitutional burdens on free exercise of religion in violation of the First Amendment.[3] They contended that this case was indistinguishable from a claim of "clergy malpractice"—not recognized under Colorado law—and that it constituted an unwarranted intrusion into internal church affairs for a court to scrutinize the manner in which a priest was selected, supervised and disciplined and the manner in which Bishop Frey counseled respondent concerning her prior relationship with Father Robinson. They also argued that there was insufficient evidence to support any of the claims.[4]

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[2] At the trial level, respondent was also successful in claiming that petitioners should be held liable for Father Robinson's conduct on a *respondeat superior* theory. The jury awarded $728,100 against petitioners based on their negligence and breach of fiduciary duty. It awarded an additional $488,400 reflecting petitioners' vicarious liability for Father Robinson's breach of fiduciary duty. These awards were reduced by $118,000 because of a statutory cap on noneconomic damages. With interest, the trial court judgment totalled $1,743,045.10. Pet. App. 56a.

[3] In its opinion, the Supreme Court of Colorado stated that this argument had not been raised in the trial court, but it chose to reach and decide the First Amendment issue. Pet. App. 12a-13a & n.10.

[4] Thus, for example, they argued that respondent had not established that the bishop and the Diocese in fact hire or supervise assistant priests like Father Robinson. They also questioned whether there was sufficient evidence to show that the selection and/or supervision of Father Robinson was in any way negligent.

The Colorado Supreme Court affirmed with respect to the negligence and fiduciary duty claims at issue here.[5] In doing so, the court undertook no analysis of the actual impact of the tort claims on petitioners' exercise of religious functions. Rather, it held that such an analysis was unnecessary, given that respondent had asserted tort claims that are also applicable against other employers and fiduciaries and that the particular conduct she challenged was not a "matter of purely ecclesiastical concern." Pet. App. 16a-17a. The court stated that "[a]pplication of a secular standard to secular conduct that is tortious is not prohibited by the Constitution." Pet. App. 16a (citing, *inter alia, Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990)). The court also held that there was sufficient evidence to allow a jury to find that Bishop Frey had breached a fiduciary duty to respondent when he met with her, and that petitioners acted negligently when they permitted Father Robinson to become an assistant priest and did not closely supervise his dealings with parishioners. Pet. App. 17a-34a.

Petitioners filed a petition for rehearing, arguing that the court had misinterpreted the record and misapplied the pertinent constitutional principles. In that petition, they also drew the court's attention to the federal Religious Freedom Restoration Act, which was signed into law the day after the decision of the Colorado Supreme Court. In that statute, Congress barred any level of government from imposing a burden on the free exercise of religion—even through a rule of general applicability—unless the government can show that its action is the least restrictive means of serving a compelling governmental

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[5] Petitioners' initial appeal was to the Colorado Court of Appeals. While the case was being briefed, however, the Colorado Supreme Court decided to hear the case itself. That court did reverse the portion of the judgment that was based on *respondeat superior*. *See* note 2 *supra*. It concluded that there was insufficient evidence to show that Father Robinson's sexual relationship with respondent was within the scope of his employment. Pet. App. 2a-3a, 38a.

interest. Pub. L. No. 103-141, § 3, 107 Stat. 1488 (1993) (to be codified at 42 U.S.C. § 2000bb-1). Petitioners argued that, in light of this statute, it was no longer permissible for the Colorado Supreme Court to affirm the tort judgment against them without first determining whether the judgment created a burden on free exercise and, if it did, applying the compelling-interest test. The Colorado Supreme Court, without addressing the effect of the Act, denied rehearing in a summary order. Pet. App. 57a.

REASONS FOR GRANTING THE WRIT

The Colorado Supreme Court in this case held that a state court may determine whether a bishop and his diocese acted appropriately in selecting and supervising a parish priest and in responding to disclosure by a parishioner that she had engaged in an affair with the priest. In so doing, it rejected the argument that judicial scrutiny of such issues—intertwined as they are with ecclesiastical judgments about religious counseling and the choice of clergy by the church—imposes an unconstitutional burden on free exercise of religion. The court did so, moreover, without even considering the extent of such a burden or the State's justifications for imposing that burden. Instead, it held that this case was controlled by *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990), where this Court ruled that the free exercise clause is not implicated by the incidental effects of otherwise valid general prohibitions. *See* Pet. App. 16a.

This constitutional analysis represents a troubling extension of the rule set forth in *Smith*. It is one thing to say that the State may absolutely prohibit certain practices, wholly without regard to the context in which they occur. It is quite another, however, to say that a judge or jury may decide, on an *ad hoc* basis, whether a bishop and his diocese acted reasonably in hiring, supervising and disciplining a priest and whether the bishop was suffi-

ciently supportive and helpful in providing pastoral counseling to a parishioner. In applying state tort law to those claims, the jury is not simply deciding whether a generally prohibited practice did or did not occur; rather, it is making value judgments about whether officials of the church carried out particular, inherently religious functions in an appropriate manner. Furthermore, insofar as the State is reviewing the substanc of the counseling provided by the clergy to its parishioners—to decide, for example, if the bishop assigned too much responsibility to the parishioner for her actions (Pet. App. 21a-22a)—the State has moved a long way away from regulating only conduct and into the realm of regulating beliefs.

Although these issues, in our view, would ordinarily warrant plenary review in this Court, the recent enactment of the Religious Freedom Restoration Act of 1993 appears to make final resolution of these constitutional questions unnecessary. That statute, signed into law on the day after the court below ruled, prohibits any government from imposing a burden on the free exercise of religion—even through the application of a rule of general applicability—absent a showing that the rule is the least restrictive means of furthering a compelling state interest. Pub. L. No. 103-141, § 3, 107 Stat. 1488 (1993). Because this statute, by its terms, would seem to be applicable to pending cases like this one, it provides a potential non-constitutional basis for resolving this case and protecting petitioners' interest in avoiding burdens on their free exercise of religion. The court below, however, never addressed this statutory issue, and left in place an opinion that is flatly inconsistent with the congressional mandate. We therefore ask that the Court grant this petition, vacate the decision below, and remand the case for consideration of the impact of the new federal statute on this case.

1. Had Congress not enacted the Religious Freedom Restoration Act, we believe that the ruling issued by the Colorado Supreme Court would justify plenary review by

this Court. The court below resolved an important constitutional issue—the application of the *Smith* rule to torts affecting religious counseling and the hiring of clergy—in a manner that threatens serious interference with core religious functions. Moreover, taking into account decisions in similar cases from other jurisdictions, it seems clear that this area is in need of clarification by this Court.

This Court in *Smith* held that the free exercise clause of the First Amendment does not exempt persons from compliance with a statute burdening religious activity, provided that the burden is "merely the incidental effect of a generally applicable and otherwise valid provision." 494 U.S. at 878. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2226 (1993). Thus, in *Smith*, the Court upheld a state statute that banned all consumption of peyote, even though the members of a church demonstrated that sacramental use of peyote was an essential part of their religion. The Court held that a general statute could be applied to prohibit religiously motivated conduct, without any assessment of the extent of the burden on free exercise of religion or of the substantiality of the governmental justification for imposing that burden. 494 U.S. at 882-90.

In the present case, the Colorado Supreme Court extended *Smith* to quite another context. Rather than simply applying an absolute statutory prohibition to undisputed conduct, the court concluded that a bishop and his diocese could be held liable to respondent on three tort theories: that the bishop and diocese were negligent in hiring a priest who later had a sexual relationship with respondent; that the bishop and diocese were negligent in their supervision of that priest; and that the bishop breached a fiduciary duty by failing to give proper counseling to respondent after the relationship became known. And, relying on *Smith*, it did so without undertaking *any* analysis of the impact of such tort liability on the free

exercise of religious functions or of the justifications for such interference.

This application of *Smith* is highly problematic for several reasons. To begin with, there is a fundamental difference between the clear statutory mandate at issue in *Smith* and the case-by-case development of legal standards in tort law. When the government requires everyone, including religious worshipers, to refrain from (or engage in) specified conduct, it is setting standards of behavior for all persons in all circumstances. But it is quite another matter when the government (through a judge and jury) sets the standards that a diocese must observe in selecting and supervising a particular priest or that a bishop must follow in counseling a particular parishioner. In the latter case, it is inevitable that the standards to be applied—although stated, at one level, in general terms of "due care" or "negligence"—will take their specific shape according to views about the manner in which church officials should conduct their duties. Indeed, those standards may ultimately reflect the extent to which individual judges and juries believe that church officials should conform their advice to parishioners, and their selection of clergy, to secular guidelines. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. at 2226 (discussing *Smith*) ("Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied.").

This case, in fact, provides a clear example. As a matter of law, the Colorado Supreme Court first declared that "[o]nce a member of the clergy accepts the parishioners' trust and accepts the role of counselor, a duty exists to act with the utmost good faith for the benefit of the parishioner." Pet. App. 21a. Then, to determine whether the bishop had conducted himself in accordance with that duty, the court examined in detail the particular statements made and actions taken by Bishop Frey in responding to disclosure of the affair between respondent and Father Robinson. The court took the view that the

bishop was subject to liability because he should have placed less emphasis on granting respondent absolution and greater emphasis on helping her "in understanding that she was not the only person responsible for the sexual relationship with Father Robinson." Pet. App. 21a. It went on to conclude that the bishop should not have asked respondent to keep the affair a secret, *id.* at 21a-22a, and further criticized his failure to recommend secular counseling for her. *Id.*

The decision below, therefore, sets quite specific rules of conduct for bishops that seek to counsel parishioners. While the standards may have their origin in a "generally applicable" tort doctrine (the duty to act as a fiduciary), it is readily apparent that the standards are intended to dictate behavior in a definite context: the relationship of priest and parishioner. Thus, the State has set forth its expectation that, in the future, bishops in the position of Bishop Frey will lessen the responsibility of parishioners for their actions and recommend that parishioners seek secular counseling. Whatever their merits, these rules of conduct are quite different in substance from the rules of conduct established for attorneys handling client funds or for trustees administering estates. Those duties thus do not readily fit within the framework of generally applicable laws, as that term is used in *Smith*.

A similar problem exists with respect to the hiring and supervision claims. Although the court below also regarded those claims as involving laws of general application, they arise out of conduct—the consensual sexual relationship between respondent and Father Robinson—that is of legal concern only because Father Robinson was concurrently playing the role of pastoral counselor.[6] Thus, an implicit element of the "generic" negligent hiring and supervision claims is a "specific" determination that

[6] For example, if Father Robinson had been a maintenance employee at the church, rather than a priest undertaking to counsel respondent, there clearly would have been no basis for suing petitioners.

it is impermissible to combine pastoral counseling with consensual sexual activity.[7] And the negligent hiring and supervision claims, in turn, rest upon a "specific" judgment that a church must reject for the priesthood any applicants with personal histories, or psychological profiles, that suggest a possibility of engaging in that behavior.

The use of tort standards to judge the counseling given by a bishop to a member of the church also brings the State far closer to regulation of religious beliefs themselves. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (forbidding government regulation of religious beliefs). For this reason, in fact, there is now a general consensus in the case law that states should not recognize a tort of "clergy malpractice." *See, e.g., Bladen v. First Presbyterian Church*, 857 P.2d 789, 795 (Okla. 1993); *Nally v. Grace Community Church of the Valley*, 763 P.2d 948, 960 (Cal. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Destefano v. Grabrian*, 763 P.2d 275, 285 (Colo. 1988); *Schmidt v. Bishop*, 779 F. Supp. 321, 327 (S.D.N.Y. 1991). The courts so holding have recognized that it would be constitutionally suspect to scrutinize the professional conduct of members of the clergy because that conduct is intimately bound up with the particular religious beliefs and attitudes of each denomination. As one Court has stated, "[b]ecause of the differing theologi-

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[7] This holding is even more troubling because, in order to hold petitioners liable for their hiring and supervision of Father Robinson, the court was required to disregard the official structure of the Episcopal Church, under which petitioners perform neither of these functions. The court relied on expert testimony about the informal influence that bishops may exercise over churches in the selection and supervision of assistant priests. *See* Pet. App. 27a-30a. In so doing, it said, in effect, the bishops *should* exercise authority over these matters, even though that function is placed elsewhere by canon law. Such a determination is constitutionally suspect. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09 (1976); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 120-21 (1952).

cal views espoused by the myriad of religions in our state and practiced by church members, it would certainly be impractical, and quite possibly unconstitutional, to impose a duty of care on pastoral counselors. Such a duty would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity." *Nally*, 763 P.2d at 960. *See also Schmidt*, 779 F. Supp. at 328 (tort "would require the Court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of [each] denomination").

The same reasoning, however, should prevent a state from regulating the advice given by priests to parishioners under other rubrics like "negligence," or "counselor malpractice" or "breach of fiduciary duty." *See Schmidt*, 779 F. Supp. at 326-27. The duties imposed by any of these tort theories will necessarily involve judges and juries in assessing whether the views expressed by church officials comport with secular standards. For example, the question whether Bishop Frey should have taken a different view regarding respondent's "responsib[ility]" for the affair with Father Robinson is not a question readily separated from church doctrine. The same may be said for advice given with respect to the need for, and benefits of, secular counseling. And the fact that counseling involves the communication of beliefs, rather than just the holding of beliefs, does not take that activity outside the ambit of the free exercise clause: for an organized church to exist at all, it must be able to communicate its beliefs to members of the church.

It hardly follows from *Smith*, therefore, that the tort judgments in this case are immune from constitutional scrutiny as the mere application of neutral, general rules. For that reason, we believe that this case presents issues worthy of plenary review.

2. After the decision below, however, Congress enacted the Religious Freedom Restoration Act. That stat-

ute creates nonconstitutional protections for the free exercise of religion that go beyond the constitutional protections recognized in *Smith*. Specifically, Congress mandated that "[g]overnment shall not substantially burden a person's exercise of religion, *even if the burden results from a rule of general applicability*," § 3(a), Pet. App. 60a (emphasis added), unless the government demonstrates that the burden is the least restrictive means of furthering a compelling governmental interest. § 3(b), Pet. App. 60a. The statute further provides that a "person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." § 3(c), Pet. App. 60a.

In cases where this statute applies, therefore, the precise contours of the *Smith* rule will no longer be the controlling issue. For example, if the statute were applied to the facts of this case, it would not be decisive whether tort doctrines like "breach of fiduciary duty" are properly treated as rules of "general applicability" immune from exacting scrutiny under the free exercise clause. Even if they were so treated, the statute would require assessment of the burden caused by application of such tort doctrines in cases involving religious activity, and it would require that any substantial burden be justified under the compelling interest test.

The question, then, is whether the Act applies to this case. Section 6(a) of the Act provides that it is to apply "to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act." § 6(a), Pet. App. 61a. In our view, the effort to prosecute and collect a tort judgment under state law is plainly "an implementation of that law," and thus is subject to the terms of the Act at any time prior to final judgment.[8]

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[8] The Act preempts all state laws that "burden" free exercise without a sufficient justification. It is difficult to see why Congress,

But, even if this question is ultimately one that this Court must resolve, we believe that any ruling about the retroactivity of the Act would be more appropriately made after the court below has addressed the question. Here, as noted above, the statute was not signed into law until after the Colorado Supreme Court ruled, and that court failed to address the impact of the statute when the issue was presented to it in a rehearing petition.

Taking into account all of these circumstances, petitioners submit that the most appropriate action for the Court to take at this time would be to grant a writ of certiorari, vacate the decision below, and remand the case for consideration of the impact of the new federal statute. This Court has taken such an action on a number of occasions in prior cases. *See Bureau of Economic Analysis, U.S. Dep't of Commerce v. Long*, 454 U.S. 934 (1981); *IRS v. Fruehauf Corp.*, 429 U.S. 1085 (1977). *See also Brooks v. Winter*, 461 U.S. 921 (1983) (taking such an action in an appeal); *City of Philadelphia v. New Jersey*, 430 U.S. 141 (1977) (*per curiam*) (same). And there is every reason to do so here as well.

To begin with, in view of the likelihood that Congress intended the new statute to apply to pending cases like this one, an order vacating and remanding the case would assure that the will of Congress is vindicated and that petitioners' rights do not fall through the cracks. At present, relying on the *Smith* doctrine, the controlling decision in this case avoids any assessment of the burdens imposed by the tort judgments on petitioners' free exercise of religion. Since the applicable law was at least arguably changed by Congress the next day, petitioners have a right to ask that some court address the impact of the statute on their case. This Court routinely vacates and remands cases in order to allow lower courts to con-

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in accomplishing this goal, would have wanted to allow further "burdens" to be imposed through the continued enforcement of preempted laws in pending cases involving previous conduct.

sider the impact of recent decisions clarifying the law. Here, where the change occurred legislatively, there is no apparent reason to take a different approach. *See* cases cited at page 14 *supra.*

The argument for a remand order is all the stronger in a case like this one where the decision below, on its face, raises troubling and important constitutional issues. Before deciding whether those constitutional issues merit review, it only makes sense to ask the Colorado Supreme Court to consider whether the case can be resolved on a newly available, nonconstitutional basis. At that point, no party may see a need for further review. Moreover, even if the case does return here, the Court will be in a much better position to assess the nature and the continuing significance of the legal issues presented. *Cf. City of Philadelphia v. New Jersey*, 430 U.S. at 142.

CONCLUSION

The Court should grant a writ of certiorari, vacate the decision below, and remand this case for reconsideration in light of the Religious Freedom Restoration Act.

Respectfully submitted,

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Dated: April 6, 1994

APPENDICES

APPENDIX A

SUPREME COURT OF COLORADO
EN BANC

No. 92SA415

MARY E. MOSES, n/k/a MARY ELAINE TENANTRY,
Plaintiff-Appellee and Cross-Appellant,

v.

THE DIOCESE OF COLORADO, a Colorado corporation, and
BISHOP WILLIAM FREY,
Defendants-Appellants and Cross-Appellees.

Nov. 15, 1993

Rehearing Denied Dec. 6, 1993

Justice ERICKSON delivered the Opinion of the Court.

This appeal is from a judgment entered on a jury verdict awarding Mary E. Moses, who is now known as Mary Moses Tenantry (Tenantry), $1,216,500 as damages against the Episcopal Diocese of Colorado, a Colorado corporation (Diocese), and Bishop William Frey (Bishop Frey). Tenantry was a parishoner at St. Philip and St. James Episcopal Church in Denver. She sought counseling from Father Paul Robinson (Father Robinson), who was then an assistant priest at St. Philip and St. James. Although Tenantry had a long history of mental illness, her condition was relatively stable at the time she began

her counseling with Father Robinson. While counseling and advising Tenantry, Father Robinson entered into a sexual relationship with her that included multiple acts of both fellatio and cunnilingus. When her relationship with Father Robinson ended, Tenantry suffered a relapse and aggravation of her mental illness. Shortly thereafter, her marriage ended in divorce. Tenantry is now under psychiatric care which will be required indefinitely.

The jury found that Bishop Frey and the Diocese breached their fiduciary duties to the plaintiff, the Diocese negligently hired and negligently supervised Father Robinson, and was vicariously liable for Robinson's breach of his fiduciary duty to Tenantry. The award consisted of $598,000 for economic damage and $618,000 for noneconomic damage. The trial judge reduced the verdict for noneconomic damage by $118,000 to comply with the statutory limit of $500,000 imposed by section 13-21-102.5, 6A C.R.S. (1987 & 1993 Supp.).

On appeal, the Diocese and Bishop Frey assert that the First Amendment of the United States Constitution forecloses recovery for clergy malpractice and an award against them for the damages sustained by Tenantry. If the First Amendment defense is valid, the remaining issues on appeal are moot. In our view, the First Amendment does not grant the Diocese and its employees immunity from liability in this case. The Diocese and Bishop Frey also assert that the evidence was insufficient to support the jury's findings.[1] We disagree in part. The evidence was sufficient to support Tenantry's claims for breach of fiduciary duty, negligent hiring, and supervision. The evidence, however, was not sufficient to prove that Robinson

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[1] On appeal, all of the evidence must be construed to support the jury's verdict if such construction is reasonable. *Lambrecht v. Archibald*, 119 Colo. 356, 203 P.2d 897 (1949); *see also City of Aurora v. Loveless*, 639 P.2d 1061 (Colo.1981) (stating if reasonable, court must interpret evidence adduced at trial to make the jury's verdict consistent).

was acting within the scope of his employment when he engaged in oral sex with Tenantry; therefore, the Diocese is not vicariously liable for Robinson's sexual acts with Tenantry.

Tenantry asserts in her cross appeal that the trial court should not have reduced the noneconomic damage award because section 13-21-102.5, 6A C.R.S. (1987 & 1993 Supp.), is unconstitutional. Because we vacate the award predicated on vicarious liability, the noneconomic damage award does not exceed the statutory cap and the issue submitted on cross appeal is moot.[2]

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[2] Section 13-21-102.5, 6A C.R.S. (1987 & 1993 Supp.), creates a "damage cap" for "noneconomic loss or injury." Subsection 3(a) provides that "[i]n no case shall the amount of such damages exceed five hundred thousand dollars." The jury awarded Tenantry $618,000 in noneconomic damages and the trial court reduced that award to $500,000 pursuant to the statute.

Tenantry contends that section 13-21-102.5 violates tort victims' due process and equal protection rights and the open courts provision of the Colorado Constitution embodied in article II, section 6. Although we have upheld statutory damage caps as constitutional in the past, *see State v. DeFoor*, 824 P.2d 783 (Colo.) (upholding a cap on damages in an action against a public entity), *cert. denied*, —— U.S. ——, 113 S.Ct. 483, 121 L.Ed.2d 387 (1992), we do not address the constitutionality of the $500,000 statutory damage cap because the jury erroneously found the Diocese vicariously liable for the breach of fiduciary duty by Father Robinson. When the erroneous portion of the award is vacated, the remainder of the jury award for noneconomic damages is $370,800. *See infra* note 26.

Section 13-21-102.5(4) requires that the statutory cap "not be disclosed to a jury in any such action, but shall be imposed by the court before judgment." Therefore, the damage cap was applied by the trial judge after the jury awarded damages, and the jury's deliberation concerning the total damage award was not affected prior to the time the trial judge applied the statutory cap. Because the statutory cap could not have influenced the jury's damage award, no remand is necessary to determine the amount of damages the jury would have awarded had the trial court not applied the statutory cap.

The statutory damage cap also limits an award for "noneconomic loss or injury" to $250,000 unless the court finds justification by

Accordingly, we affirm the judgment of the trial court on Tenantry's claims for breach of fiduciary duty and negligent hiring and supervision. We reverse the judgment for damages against the Diocese and Bishop Frey based upon the claim of vicarious liability, and remand with directions.

I

A

Tenantry and one of her older sisters, Joyce Mohr (Mohr), were sexually abused by their father when they were children. Expert testimony established that Tenantry developed a multiple personality disorder as protection against the sexual abuse by her father.[3] Before Tenantry entered grade school she had developed several separate identities.

Tenantry married Geoffrey Moses (Moses) in 1974. Moses knew of, and attempted to help Tenantry overcome, her mental illness. The couple were married for sixteen years and five children were born as issue of their marriage. Tenantry has hospitalized and attempted suicide in 1978 and 1979 because of her mental illness. While Tenantry was being treated for her mental illness, there were periods during which she was permitted to visit her children only if an outside party supervised the visitation. Father Vernon Myers (Father Myers), the priest

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clear and convincing evidence of damages which exceed that amount. The trial judge found by clear and convincing evidence that total noneconomic damages exceeded $250,000. The portion of the noneconomic damages awarded by the jury and supported by this decision remains over $250,000 and we agree with the trial court that there is clear and convincing evidence which justifies a noneconomic damage award over $250,000. The cross-appellant does not challenge the constitutionality of the $250,000 statutory cap.

[3] A multiple personality disorder is a protective mechanism which may be employed by children who suffer extensive abuse. The mechanism disassociates the child from the abusive acts.

at St. Philip and St. James Parish, often supervised these visits. The association between Father Myers and Tenantry existed before he supervised the visits because he performed the marriage ceremony for Moses and Tenantry and baptized all of their children.

After treatment for her mental illness concluded in 1979, Tenantry became an active member of St. Philip and St. James Parish. Two of Tenantry's sisters were also members of the parish and together the three sisters participated in social events, taught Bible classes, and supervised children's programs. The husbands of the three sisters were also involved in the activities of the parish and all three men served on the parish vestry—the governing board of the church. By all accounts, Tenantry's mental illness appeared to be in remission during the period that she and members of her family actively participated in church programs and activities. Tenantry's membership in the church started the longest period of improved mental health she had ever experienced.

In 1984, the vestry of St. Philip and St. James decided to hire an assistant priest because Father Myers was nearing retirement. Father Myers suggested the vestry interview Father Robinson, a newly ordained priest who would help the vestry accomplish its goal of attracting young families to the parish. Father Myers interviewed Father Robinson during his ordination period and knew that Bishop Frey considered Father Robinson to be "bishop material." Neither Bishop Frey nor the Diocese provided the church vestry with any of the information about Father Robinson contained in the Diocese's personnel files. Included in Father Robinson's personnel file were reports of psychological examinations that were conducted as a result of Father Robinson seeking ordination. These reports indicated Father Robinson had problems with depression, low self-esteem, and possessed a "sexual identification ambiguity."

Father Robinson was selected by the vestry to begin his duties as assistant priest at St. Philip and St. James Parish in June 1984. Tenantry and her husband were among many of the young couples who befriended Father Robinson and his wife. An outgrowth of Father Robinson's interaction with the young members of the parish was that a number of the women in the parish, including Tenantry and Mohr, were attracted to, and infatuated with Father Robinson. Tenantry's brother-in-law, Michael Padbury (Padbury), warned Father Robinson that both Tenantry and Mohr were infatuated with him.[4]

In September 1984, Tenantry sought counseling with Father Robinson to discuss her fear that she was responsible for the cerebral palsy that afflicted her youngest child. At the time of these counseling sessions, Father Robinson knew Tenantry and Mohr had been sexually abused as children. Tenantry's counseling sessions with Father Robinson always ended with a prayer and a hug. The hugs eventually led to fondling, and finally, to mutual oral sex. On at least one occasion, Tenantry and Father Robinson attempted to have intercourse but were interrupted. During the course of the sexual relationship, they never had intercourse.

In mid-1985, Tenantry told Mohr about her sexual relationship with Father Robinson. Mohr confronted Father Robinson who at first denied, but then admitted, there was a sexual relationship. Father Robinson concluded his conversation with Mohr by indicating that Mohr must keep his sexual relationship with Tenantry a secret because the conversation constituted a confession. Despite Father Robinson's attempt to keep Mohr from disclosing the sexual relationship with Tenantry, Mohr discussed the conversation with her husband. While visiting another

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[4] Among the difficulties Tenantry experienced as a result of the sexual abuse she suffered as a child was her inability to understand appropriate behavior or recognize accepted boundaries with respect to her relationships with men.

Episcopal church, Mohr and her husband consulted Father Bruce McNabb (Father McNabb) regarding whether Father Robinson had made a confession and what course of action they should take to help Tenantry. Father McNabb told Mohr she had not received a confession and was not required to keep the relationship confidential. He recommended that Mohr and her husband immediately tell Father Robinson's superior, Father Myers, about the relationship.

Acting on Father McNabb's recommendation, Mohr and her husband saw Father Myers. Mohr told Father Myers about the sexual relationship between Tenantry and Father Robinson and about Father Robinson's attempt to keep the relationship a secret. Mohr advised Father Myers that she had consulted Father McNabb and that he told her Father Robinson could not force her to be quiet. Father Myers' reaction to the sexual relationship shocked both Mohr and her husband.[5] Father Myers was angered that Mohr did not keep Father Robinson's secret and scolded her for discussing the relationship with her husband and Father McNabb. Father Myers said that Father Robinson was bishop material and that Mohr and her husband should not ruin his career. Father Myers also asked them why they were trying to destroy Father Robinson and said that Father Robinson's actions were not that bad and that Tenantry had not been injured. As a result of this meeting, Mohr's husband resigned from the vestry and the couple decided to disassociate themselves from the St. Philip and St. James parish.

After the meeting, Father Myers confronted Father Robinson and Father Robinson admitted to having oral sex with Tenantry. Father Myers told Father Robinson to be more careful in the future. Once Father Myers had

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[5] Evidence presented at trial indicated that Myers had known of the relationship before being confronted by Mohr. Specifically, Myers had ordered Tenantry to stop talking to Robinson before Tenantry spoke to Mohr about the relationship.

spoken with Father Robinson, he involved the Diocese in the matter.[6] No action was taken by the Diocese to help Tenantry after Father Myers' meeting with Mohr and her husband.

Mohr and her husband related the content and outcome of their discussion with Father Myers to Padbury, who was a member of the vestry and was married to Tenantry's oldest sister. Padbury decided that his strong relationship with Father Myers would enable him to compel Father Myers to address the issue. At a vestry retreat, Padbury confronted Father Myers about the relationship between Tenantry and Father Robinson seeking to understand what had happened. Father Myers told Padbury that he did not understand why Mohr and her husband were so upset and that there were worse things a priest could do. The response caused Padbury to question Father Myers about what action the church had taken. Father Myers indicated that he had received a "satisfactory response" from Father Robinson and was not pursuing the matter. Both Father Myers and Father Robinson attempted to ignore the situation. Father Myers also ordered Tenantry not to talk to Father Robinson.

In an attempt to separate herself from Father Robinson, Tenantry persuaded her husband to leave St. Philip and St. James and to attend Ascension Episcopal Church. By the fall of 1985, the traditional Tenantry family gatherings after church had disintegrated and Tenantry's mental illness resurfaced. The pressure of maintaining the secrecy of the affair caused Tenantry not only to deteriorate men-

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[6] Father Myers was impeached at trial concerning whether he notified the Diocese of Tenantry and Robinson's relationship immediately after Mohr's allegations in August of 1985. In deposition, Father Myers stated that as a result of the meeting with Mohr, he confronted Robinson and then immediately involved the bishop because the bishop should be involved in any serious matter. This evidence contradicts the Diocese's assertion that it was not aware of the matter until March of 1986.

tally but also to become physically ill. By February 1986, Father Robinson and Tenantry's sexual relationship had ended.

After leaving the church, Tenantry learned that Father Robinson had received a call to be the pastor at St. Michael's Episcopal Church in Colorado Springs. She asked her husband, Moses, about his feelings concerning Father Robinson's new position. Unaware of any relationship between his wife and Father Robinson, Moses said he was sorry to see a friend go, but it was a good job and he was happy for Father Robinson. Over the course of the next few days, Tenantry continued to tell her husband she was upset by Father Robinson's appointment and eventually told him of her sexual relationship with Father Robinson.

Moses confronted Father Robinson and Father Robinson denied, and then admitted, the existence of a sexual relationship. Moses told Father Robinson he intended to call Bishop Frey and tell him of the relationship. Father Robinson then called Father Myers who arranged to see Moses. Moses demanded Father Myers inform Bishop Frey about the relationship. Bishop Frey scheduled a meeting on March 4, 1986, with Moses, Father Robinson, and Father Myers. On March 3, 1986, the day before the scheduled meeting, Bishop Frey signed a letter which promoted Father Robinson to the position of pastor of the Colorado Springs church.[7]

At the March 4 meeting, Father Robinson admitted to a sexual relationship with Tenantry which included oral

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[7] Bishop Frey did not inform the vestry of Father Robinson's newly assigned parish about the allegations against Father Robinson despite the fact that Bishop Frey knew that the prior priest assigned to the Colorado Springs parish had left that church because of his illicit sexual relationship with a parishioner.

An expert who testified at trial expressed the opinion that the likelihood of a priest repeating sexual relationships with parishioners is fifty percent.

sex but not intercourse. Bishop Frey asked Moses if he would be content to let the Bishop supervise "whatever needed to happen." Moses acquiesced to Bishop Frey assuming control of the matter. Bishop Frey arranged to meet with Tenantry in order to resolve the matter. After Moses left, Bishop Frey informed Father Robinson that if this was a one-time episode, he would not mention it to the Colorado Springs parish. The Bishop also gave Father Robinson a book entitled "Affair Prevention" and told him to get counseling and to advise him immediately if the matter came up in the Colorado Springs parish.

Moses returned home and informed Tenantry that Bishop Frey wanted to see her. Tenantry was terrified about the loss of her salvation and feared having to meet with the Bishop. At their meeting, Tenantry described her past to Bishop Frey and explained that she had an intimate sexual relationship with Father Robinson. Tenantry discussed her fear of not having salvation because of her acts and Bishop Frey granted Tenantry absolution. At trial, Bishop Frey testified that at this meeting his impression of Tenantry was that she was fragile and had a sense of guilt that bordered on pathological because she blamed herself for the relationship.[8]

Tenantry explained to Bishop Frey that she still loved Father Robinson. Bishop Frey told Tenantry that if she loved Father Robinson she should not talk to anyone about her relationship with him, never go near the church, and never talk to Father Robinson again. Tenantry received permission from Bishop Frey to speak to a priest or counselor. Tenantry told Bishop Frey that she had discussed the relationship with her sister and asked if she needed to stop talking with her. Bishop Frey stated that the prohibition on talking to people included Tenantry's sister. Tenantry then asked if she could talk to her hus-

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[8] Subsequent to Tenantry's commencement of her legal action for damages in February 1990, Bishop Frey provided a statement to the newspapers in which he described Father Robinson as "a fine priest" and Tenantry as "an unfortunate lady."

band and Bishop Frey gave her permission to talk to him. The Bishop took no further action to assist Tenantry after this meeting.

Soon after her meeting with Bishop Frey, Tenantry started a day-care business and stopped participating in church activities. In 1989, she encountered Father Robinson by chance at Denver General Hospital. Tenantry reported the meeting to her husband. The reoccurrence of contact between Tenantry and Father Robinson resulted in dissolution of Tenantry's marriage. In May 1990, Tenantry and Moses separated, and in October 1990, they divorced. Subsequently, Tenantry's mental health deteriorated; she stopped spending time with her family, and her day-care business failed. At trial, mental health experts testified that the discovery of Bishop Frey's promotion of Father Robinson led to the unraveling of Tenantry's personality structure. Tenantry was diagnosed as suffering a recurrence of her multiple personality disorder and past-traumatic stress syndrome.[9]

B

In February 1990, Tenantry commenced a civil action against the Diocese and Father Robinson. Tenantry later amended her complaint to include Bishop Frey. Subsequently, Father Robinson filed for bankruptcy and Tenantry's claims against him were severed from the case. The jury returned a verdict finding the defendants liable

[9] These experts testified that the church provided Tenantry with a structure that helped her deal with multiple personality disorder and taught her to organize her life and to act in an acceptable way. The structure provided by the church broke down as a result of Tenantry's sexual relationship with Father Robinson because she lost her capacity to trust in God and the church. Bishop Frey aggravated the breakdown in trust when he (1) allowed her to believe that she was primarily at fault; (2) did not ask to hear her side of the affair; (3) did not ask her how she felt about the relationship or how she planned to deal with it; and (4) requested that she maintain secrecy about the relationship.

for breach of fiduciary duty and negligent hiring and supervision and awarded Tenantry damages of $728,100; the jury also found the defendants vicariously liable for Father Robinson's breach of fiduciary duty and awarded $488,400.

We affirm the judgment of the trial court on the issues of breach of fiduciary duty and negligent hiring and supervision. We reverse the judgment on vicarious liability.

II

For the first time on appeal, the defendants have formulated First Amendment defenses that were not raised in the trial court and allegedly bar Tenantry's claims for injuries she suffered as a result of the conduct of Father Robinson, Bishop Frey, and the Diocese. The First Amendment issues raised on appeal were not properly preserved in the trial court. However, it is within our discretion to review the First Amendment defenses.[10]

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[10] The defendants' only argument at trial regarding the First Amendment was it barred admission of two pamphlets that described the hierarchical structure of the Episcopal Church. The defendants submitted a trial brief in support of their position that the pamphlets should not be admitted. In their brief, the defendants asserted that any evidence of church law or discipline should not be admitted. The defendants phrased the summary of this argument very broadly in their Rule 16 disclosure statement—"the First Amendment prevents the court from resolving any claims based upon interpretations of 'church law.'" The trial briefs and the record show that the defendants' only argument at trial was that the First Amendment barred admission of church documents in a civil court proceeding. The defendants did not argue at trial that the First Amendment forbids claims of breach of fiduciary duty, negligent hiring and supervision and vicarious liability against a religious organization.

We have consistently held, with few exceptions, issues not raised in the trial court cannot form the basis of an appeal. *See, e.g., Paine, Webber, Jackson & Curtis, Inc. v. Adams*, 718 P.2d 508, 513 (Colo.1986) (recognizing that appellate challenges to issues that do not call into question the trial court's subject matter jurisdiction

C.A.R. 1(d); *see Mt. Emmons Mining Co. v. Town of Crested Butte,* 690 P.2d 231, 238 (Colo.1984) (stating the exercise of discretion to notice an issue not raised below "is especially appropriate in a case involving a record that does not clearly establish the evidentiary basis for the rendition of a final judgment on substantial constitutional claims"). The First Amendment to the United States Constitution does not grant religious organizations absolute immunity from tort liability. Liability can attach for breach of a fiduciary duty, negligent hiring and supervision. *Destefano v. Grabrian,* 763 P.2d 275, 284, 286-87 (Colo.1988).

A

The First Amendment to the United States Constitution prohibits any "law respecting the establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The amendment "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell v. Connecticut,* 310 U.S. 296, 303-04, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940).

Watson v. Jones, 80 U.S. (13 Wall.) 679, 20 L.Ed. 666 (1871), established the doctrine of judicial abstention in matters involving court interpretation of ecclesiastical law. *Watson* involved a struggle between two factions of a local Presbyterian church for control of the local church's property. *Id.* 80 U.S. at 684-85. The governing body of the Presbyterian Church of the United

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and that are not raised in the trial court are waived and will not be reviewed for the first time on appeal). The fact that the non-preserved issue involves questions of constitutional analysis, interpretation, or application is not dispositive of whether we will address the issue on appeal. *See, e.g., Massey v. People,* 656 P.2d 658, 662 (Colo.1982) (declining to address a constitutional argument on appeal that was not presented for determination by the trial court).

States ordered all members of local congregations who believed in the divine character of slavery to "repent and forsake these sins." *Id.* at 691. A minority faction of one local congregation deemed this order a deviation from the church's original doctrine. The minority faction alleged they were the true church and should control their local church's property. An ecclesiastical judiciary of the Presbyterian Church interpreted the church's law and decided which of the disputants should have possession of the local church property. The losing faction sought a contrary determination in the civil courts. The Supreme Court held that civil courts could not deprive religious bodies of the right to construe their own church laws.[11]

The Court has continued to define what are matters of purely ecclesiastical concern and has applied the doctrine of judicial abstention to cases that do not involve property disputes. *See Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 21 L.Ed. 69 (1872) (stating civil courts have no power to question ordinary acts of church discipline, requirements for membership, or whether excommunication is proper in specific cases); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952)[12] (holding state statute that declared one faction of the Russian Orthodox Church to be the owner of certain church property an unconstitutional intrusion on the decision making ability of the church authorities); *Presbyterian Church v. Mary Elizabeth Blue Hull*

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[11] *Watson* was decided prior to the application of the First Amendment to the states. The case, however, is the basis for later cases that adopted its rationale in applying the doctrine of judicial abstention to the states on a constitutional basis.

[12] *Kedroff* was the first case to come before the Supreme Court involving the doctrine of judicial abstention following the application of the First Amendment's religion clauses to the states. *See Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (specifying that First Amendment, as to religion, was made applicable to the states by the Fourteenth Amendment).

Memorial Presbyterian Church, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1968) (holding if intra-church property dispute required interpreting and weighing church doctrine, a court could not intervene; if, however, neutral principles of law could be applied without determining underlying question of religious doctrine and practice, a court could intervene); *Serbian E. Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976) (forbidding judicial inquiry into whether the church judicatory body properly followed its own rules of procedure in removing a bishop from office).

The principle of these cases, as this court has recognized, is that courts must not become embroiled in disputes involving a religious organization if the court would be required to interpret or weigh church doctrine. *See Bishop and Diocese of Colorado v. Mote,* 716 P.2d 85, 102 (Colo.1986) (stating that *Jones* and its progeny do not require a court to abstain from religious controversy "as long as the inquiry does not require resolutions of disputed issues of religious doctrine"). *Mote* held that Colorado law required application of the "neutral principles" doctrine when a court is resolving a religious property dispute. *Id.* at 96. The "neutral principles" doctrine was first announced in *Blue Hull,* 393 U.S. at 449, 89 S.Ct. at 606, and allows a court to apply the neutral laws of the state to religious organizations but forbids a court from resolving disputed issues of religious doctrine and practice. In *Jones v. Wolf,* 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979), the Supreme Court of the United States explained, "[t]he neutral-principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods." *Id.* at 606, 99 S.Ct. at 3027.

Even though *Mote* involved a church property dispute, we noted that during the turn of the century this court

had held that religious corporations, "are subject to the principles of the common law and the practice and procedure applicable to corporations under the general incorporation laws, so far as the same are pertinent." *Mote*, 716 P.2d at 98 (quoting *Horst v. Traudt*, 43 Colo. 445, 96 P. 259 (1908)). We recognized in *Mote* that *Horst* was not controlling precedent but we read *Horst* as general guidance and "as a persuasive statement that this court should analyze legal issues that arise out of church organizations in the same manner as we would analyze those issues if they arose out of any other corporation or voluntary association." *Mote*, 716 P.2d at 99.

Application of a secular standard to secular conduct that is tortious is not prohibited by the Constitution. *See Mote*, 716 P.2d at 98-99; *Horst*, 43 Colo. at 448, 96 P. at 259; *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (stating that even religiously motivated conduct is not immune from neutral laws of general applicability). The Supreme Court has not granted churches broad immunity against being sued in civil courts. *See Destefano*, 763 P.2d at 284 n. 9; *see generally*, Carl H. Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W.Va.L.Rev. 1 (1986). Civil actions against clergy members and their superiors that involve claims of a breach of fiduciary duty, negligent hiring and supervision, and vicarious liability are actionable if they are supported by competent evidence in the record. *Destefano*, 763 P.2d at 284, 286-87.

The facts of Tenantry's case indicate that an organization, confronted with the misdeeds of one of its agents, assumed control of the matter and in the process of protecting itself injured a vulnerable individual. The defendants have not argued that Bishop Frey's decision to assume control and resolve the problems created by Father Robinson and Tenantry's relationship was a matter of

purely ecclesiastical concern. Tenantry's claims in this case do not involve disputes within the church and are not based solely on ecclesiastical or disciplinary matters which would call into question the trial court's power to render a judgment against the defendants. Our decision does not require a reading of the Constitution and Canons of the Protestant Episcopal Church or any other documents of church governance. Because the facts of this case do not require interpreting or weighing church doctrine and neutral principles of law can be applied, the First Amendment is not a defense against Tenantry's claims.

III

On appeal, Bishop Frey and the Diocese have urged this court to overrule *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988). The defendants contend the claims of breach of fiduciary duty and clergy malpractice are merely different names for professional liability. Their position is that because we refused to recognize a claim for clergy malpractice in *Destefano*, and all of Tenantry's claims relating to the negligence of the church and the acts of the church's agents are in reality claims for clergy malpractice, Tenantry's case should have been dismissed. We have declared that breach of fiduciary duty and clergy malpractice are not identical claims and involve different elements.[13] Sufficient evidence existed to

[13] *Destefano* held that a cause of action for breach of fiduciary duty was separate and distinct from a claim of clergy malpractice. The fundamental difference between the two causes of action is the former is a breach of trust and does not require a professional relationship or a professional standard of care, while the latter is an action for negligence based on a professional relationship and a professional standard of care. In *Destefano*, we held the defendant owed a fiduciary duty to the plaintiff that "was created by his undertaking to counsel [the plaintiff]." *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo.1988). The position of trust occupied by the defendant, when coupled with his positive act of counseling the plaintiff, resulted in a duty to the plaintiff. The relevant common facts in *Destefano* and Tenantry's case are not the profession

allow the jury to find that a fiduciary relationship existed between Bishop Frey and the Diocese and Tenantry and that the breach of the fiduciary duty caused Tenantry's injuries.

A

A prerequisite to finding a fiduciary duty is the existence of a fiduciary relationship. "A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." Restatement (Second) of Torts § 874 cmt. a (1979). A fiduciary relationship may arise where one party occupies a superior position relative to another. Stuart M. Speiser et al., *The American Law of Torts*, § 36:81 (1983) (stating that there are two ways to find a fiduciary relationship: it may presumed from the relationship of the parties; or, it may exist as a result of the superiority and influence that accompanies a repose of trust); *see also Bailey v. Allstate Ins. Co.*, 844 P.2d 1336 (Colo. App.1992) (recognizing that although some relationships give rise to a fiduciary duty as a matter of law, e.g., attorney-client, the nature of the claim is a relationship of trust, confidence and reliance). Although a professional relationship can be used as evidence that one party has both the position and opportunity to influence the other party, a professional relationship is not a prerequisite to finding a fiduciary relationship. A fiduciary relationship can arise out of a relationship of blood, business, friendship, or association. Speiser et al., *supra*, § 36:81. The claim for breach of fiduciary duty in this case involves a party who used his superior position as a counselor, a bishop, and a final arbiter of problems

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of the defendants; the relevant facts are that the defendants in both cases occupied a position of superiority, assumed a duty to act in good faith, and then breached their duty. In Colorado, breach of fiduciary duty is actionable, clergy malpractice is not. *Id.* at 284-86.

with the clergy to the detriment of a vulnerable, dependent party.

The clergy-parishioner relationship is not necessarily a fiduciary relationship. It does, however, involve the type of interaction that creates trust and reliance. Courts have recognized the fiduciary nature of the clergy-parishioner relationship. *See, e.g., Destefano,* 763 P.2d at 284 (holding a priest who abuses his role as counselor can be liable for breach of fiduciary duty); *Erickson v. Christenson,* 781 P.2d 383, 386 (Or.App.1989) (same); *Adams v. Moore,* 96 N.C.App. 359, 385 S.E.2d 799, 801 (1989) (finding preacher owed fiduciary duty to parishioner and violated that duty by using his position and influence to obtain the deed to parishioner's home).

The existence of the fiduciary relationship is a question of fact for the jury. *Paine, Webber, Jackson & Curtis, Inc. v. Adams,* 718 P.2d 508, 516-18 (Colo.1986); *Tschudy v. Amos C. Sudler & Co.,* 158 Colo. 421, 426, 407 P.2d 877, 879 (1965). In this case, the jury was properly instructed on the requisite elements of a fiduciary relationship and determined a fiduciary relationship existed between Bishop Frey and Tenantry.[14] The jury's determination of a factual issue will not be reversed if the record reveals a reasonable basis to support it. *Alzado v. Blinder, Robinson & Co.,* 752 P.2d 544 (Colo.1988); *Rupert v. Clayton Brokerage Co. of St. Louis, Inc.,* 737 P.2d 1106 (Colo.1987); *City of Aurora v. Loveless,* 639 P.2d 1061 (Colo. 1981).

In the meeting between Bishop Frey and Tenantry the parties did not occupy equal positions. Bishop Frey held

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[14] The trial court instructed the jury to consider, among other things, the extent to which Tenantry trusted the defendants; whether Tenantry's repose of trust was justified; whether the Diocese or Bishop Frey knew, or should have known, that Tenantry was relying on Bishop Frey to look out for her interests; whether the Diocese or Bishop Frey invited, accepted, or acquiesced in Tenantry's trust; and, whether the Diocese or Bishop Frey undertook to represent her interests. The defendants did not object to these instructions.

a position of authority in the church and had the power to resolve conflicts in the church. In addition, Bishop Frey's role during the meeting was as a counselor to Tenantry, not as a representative of the Diocese or Father Robinson. If Bishop Frey was acting *only* for the Diocese and Father Robinson, he failed to convey that fact to Tenantry and led her to believe he was acting in her interest.

Bishop Frey had ordered a meeting with Tenantry and Tenantry believed he had the power to decide if she would lose her salvation. Tenantry was mentally unstable and Bishop Frey recognized that she was fragile and had a pathological sense of guilt. The superior position of Bishop Frey and the power he had over Tenantry is evinced by Tenantry's request for permission to talk to people in her family and for special permission to speak to her husband. The record supports the jury's finding that Bishop Frey was in a superior position and was able to exert substantial influence over Tenantry.

B.

An unequal relationship does not automatically create a fiduciary duty. In order to be liable the superior party must assume a duty to act in the dependent party's best interest. *See Hill v. Bache Halsey Stuart Shields Inc.*, 790 F.2d 817 (10th Cir.1986) (recognizing that a fiduciary liability requires not only a repose of trust, but an assumption of a duty and breach of that duty); *First Nat'l Bank of Meeker v. Theos*, 794 P.2d 1055 (Colo.App.1990) (same). The defendants assert they are not liable because Bishop Frey and the Diocese did not take any action that would allow the jury to conclude they assumed a duty to Tenantry. There is sufficient evidence that the defendants assumed a duty to Tenantry when they acted to resolve the problems that were the result of the relationship between Father Robinson and Tenantry.

Father Myers informed the Diocese of the relationship between Tenantry and Father Robinson as early as August of 1985. Father Myers stated he took no action after informing the Diocese because the Diocese had assumed control of the matter. The fact the Diocese had assumed control was reinforced by Bishop Frey's assumption of personal responsibility for the resolution of the matter. Bishop Frey asked Moses to rely on him to take care of "whatever needed to happen" to resolve the issues created by the sexual relationship between Tenantry and Father Robinson. Bishop Frey asked to speak to Tenantry to resolve the problem. The record supports the jury's finding that Bishop Frey and the Diocese assumed a duty on behalf of Tenantry.

One of the fiduciary's duties is the duty to deal "with utmost good faith and solely for the benefit" of the dependent party. *Destefano,* 763 P.2d at 284. Once a member of the clergy accepts the parishioner's trust and accepts the role of counselor, a duty exists to act with the utmost good faith for the benefit of the parishioner. *See Destefano,* 763 P.2d at 284. The breach of the duty which the Diocese and Bishop Frey assumed is evinced by Bishop Frey's actions.

Bishop Frey had significant experience in addressing the issue of a priest's sexual involvement with a parishioner. During the course of his seventeen years as a bishop in Colorado, Bishop Frey had, on seven occasions, dealt with sexual relationships between a priest and a parishioner. Bishop Frey also knew of Tenantry's vulnerability. Despite his experience in handling issues of clergy misconduct and his knowledge of Tenantry's extreme vulnerability, Bishop Frey took no action to help Tenantry. Acting as the representative for the Diocese, Bishop Frey failed to assist Tenantry in understanding that she was not the only person responsible for her sexual relationship with Father Robinson. He did not recommend counseling for Tenantry but did recommend counseling for Father

Robinson and ordered Father Robinson to make progress reports on the counseling. Bishop Frey's only action in regard to Tenantry was to bind her to secrecy. Thus, Bishop Frey assumed control of a situation that demanded he consider Tenantry's interests and then used Tenantry's trust to her detriment.

The record supports the jury's finding that a fiduciary relationship existed between Bishop Frey and Tenantry, that the Diocese and Bishop Frey assumed a duty toward Tenantry, and that the Diocese and Bishop Frey breached their duty.

IV

Bishop Frey and the Diocese contend that the jury erred in finding the Diocese negligent in hiring and supervising Father Robinson and that the alleged negligence caused Tenantry's injuries. Bishop Frey and the Diocese maintain that there was no employment relationship between the Diocese and Father Robinson and even if there was, there was insufficient evidence in the record to support these negligence claims.[15]

A

An employer may be liable for harm to others for negligently employing an improper person for a task

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[15] Frey and the Diocese also contend that the First Amendment of the United States Constitution was violated by the trial court when it admitted into evidence two pamphlets which helped establish the employment relationship between the Diocese and Robinson. As discussed *supra* part II, Tenantry's claims for negligent hiring and supervision are not barred by the First Amendment of the United States Constitution because neutral principles of law can be applied. In order to determine if an employer-employee relationship exists, we do not have to interpret or weigh church doctrine. *See Bishop and Diocese of Colorado v. Mote*, 716 P.2d 85, 95 (Colo.1986) (quoting *Jones v. Wolf*, 443 U.S. 595, 604, 99 S.Ct. 3020, 3026, 61 L.Ed.2d 775 (1979)) (Colorado, in adopting the 'neutral-principles' doctrine, recognized "a civil court must take special care to scrutinize the [church] document in purely secular terms, and not to rely on religious precepts. . . .").

which may involve a risk to others.[16] Restatement (Second) of Agency § 213(b) (1958); *Connes v. Molalla Transport System, Inc.*, 831 P.2d 1316, 1320 (Colo. 1992). It is axiomatic that a prerequisite to establishing negligent hiring is an employment or agency relationship. The existence of an agency relationship is ordinarily a question of fact to be determined by the fact finder. *Stortroen v. Beneficial Fin. Co.*, 736 P.2d 391 (Colo.1987); *Marron v. Helmecke*, 100 Colo. 364, 67 P.2d 1034 (1937). A court can only decide whether an agency relationship exists as a matter of law when the facts are not in dispute. *Stortroen*, 736 P.2d at 395; *Smith v. Davis*, 67 Colo. 128, 186 P. 519 (1920). The existence of an agency relationship can be proven by the conduct of the parties. *Victorio Realty Group, Inc. v. Ironwood IX*, 713 P.2d 424 (Colo.App.1985); *see also* Restatement (Second) of Agency § 1 cmt. a (1958) (stating "[t]he relation of agency is created as the result of conduct"). Tenantry produced sufficient evidence to raise a factual dispute on the issue of the relationship between the Diocese and Father Robinson as well as the relationship between Bishop Frey and Father Robinson. Because a

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[16] Almost invariably, in a claim for negligent hiring, the tort committed by the employee for which the employer may be held liable is an intentional tort committed outside the scope of employment. *Connes v. Molalla Transport System, Inc.*, 831 P.2d 1316, 1321 (Colo.1992). Torts committed within the scope of employment, however, may create vicarious liability. The tort of negligent hiring is a separate cause of action and does not involve vicarious liability. The principle of negligent hiring is based not on the rule of agency but on the law of torts and is therefore distinguishable from the agency doctrine of vicarious liability discussed *infra* in part V. *Id.* at 1320-21 (quoting *Di Cosala v. Kay*, 91 N.J. 159, 450 A.2d 508, 515 (1982)) ("Thus, the tort of negligent hiring addresses the risk created by exposing members of the public to a potentially dangerous individual, while the doctrine of *respondeat superior* is based on the theory that the employee is the agent or is acting for the employer. Therefore the scope of employment limitation on liability which is part of the *respondeat superior* doctrine is not implicit in the wrong of negligent hiring.").

dispute existed, the trial court properly submitted the issue to the jury.

Agency is ultimately a question of the intention of the parties and is evidenced by their acts and not on what the relationship is called. *Granite State Fire Ins. Co. v. Mitton,* 98 F.Supp. 706 (D.Colo.1951), *aff'd* 196 F.2d 988 (10th Cir.1952). What is critical is that the parties materially agree to enter into a particular relation to which the legal consequences of agency attach even though those consequences might not have been contemplated by the parties at the time of their agreement. *Stortroen,* 736 P.2d at 391. An "agent" is generally one who acts for, or in place of, another, or is entrusted with the business of another. *Victorio Realty Group, Inc.,* 713 P.2d at 424.

The control a principal exercises over the manner of work performed by an agent is evidence that an agency relation exists.[17] *United States v. Young,* 736 F.2d 565, 567-68 (10th Cir.1983) *rev'd on other grounds,* 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). No one factor, including control, is determinative. *Dana's Housekeeping v. Butterfield,* 807 P.2d 1218, 1220 (Colo.App.1990). The most important factor in determining whether a per-

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[17] For example, in *Bradbury v. Phillips Petroleum Co.,* 815 F.2d 1356 (10th Cir.1987), the court found sufficient control to support a jury finding of agency, albeit under a lesser standard, between the exploration company and a drilling company that had contracted to perform work as an independent contractor. The court found the following evidence established an agency relation between the drilling company (agent) and the exploration company (principal): (1) the drilling company drilled where the exploration company requested; (2) the exploration company made arrangements with local land-owners to secure access and drilling rights for the drilling company; (3) an employee of the exploration company would receive complaints about the drilling company drilling on the wrong property; and, (4) that the exploration company had an employee at the drilling site on a daily basis indicating a supervisory role. *Id.* at 1360. The evidence in this case establishes sufficient control to support the jury finding of agency.

son is an agent is "the right to control, not the fact of control." *Id.; Olsen v. Bondurant & Co.*, 759 P.2d 861, 864 (Colo.App.1988).

At trial, sufficient evidence was presented to establish that the structure of the Episcopal Church was such that the Diocese and Bishop Frey had and exercised the right of control over the manner of work performed by a priest as well as the hiring, compensation, counseling performed by the priest and discipline of the priest. The evidence was sufficient, in this case, to support the finding of an agency relation between the Diocese and Father Robinson.

The evidence presented at trial shows that the structure of the Episcopal Church is basically hierarchal. A pamphlet distributed by the Episcopalian Church titled "About Being an Episcopalian" (Exhibit 25) contains a chart of the "Structure of the Episcopal Church." The chart graphically shows that the bishop presides over the Diocese and the priests. A priest presides over the parish "subject to the bishop's approval." In "The Episcopal Church: Essential Facts" another pamphlet admitted during the trial (Exhibit 24), the Episcopal Church defines the role of priests: "Priests (also known as presbyters) are ordained and consecrated to assist the bishop in overseeing the Church." The pamphlet sets forth that the diocese "is governed by its bishop and a diocesan convention composed of clergy of the diocese and lay persons elected by the parishes." Vestries call rectors to serve only after consultation with the bishop.[18] Additionally, the bishop signs a letter promoting a priest to a pastor of a parish.

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[18] The dissent distinguishes the hiring of a rector from the hiring of an assistant priest and points to evidence that the rector supervises the day-to-day duties of the assistant priest, and only the rector can terminate the assistant priest. This evidence was controverted by an expert in pastoral care who testified on cross-examination:

> Q: As a matter of fact, in the Episcopal Church, you are familiar with the fact that the bishop of an Episcopal Church

Other evidence presented at trial establishes the relationship among the rector, the bishop, the diocese, and the assistant priest. The rector supervises an assistant priest's counseling duties which are specifically prescribed by regulations promulgated by the Diocese. In addition, the rector in this case stated that he reported to the bishop and that the bishop made final decisions on discipline. Father Robinson testified that when a priest needs pastoral care, the priest looks to the bishop. The Diocese has independent responsibility for the employment of priests. The bishop oversees ordination, discipline, counseling, the maintenance of personnel files and the provision of information with respect to hiring. Vestries rely on the Diocese to prepare and educate candidates, to obtain psy-

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does not have the right to veto [the choice of] an assistant, a curate, I am talking about a curate [assistant priest] now, not a priest.

A: If you are using the term "veto" which is not a church term to refer to some sort of canon which says you can say no, yes. If you are talking about the effect of the ability to veto, you are wrong. The reality is that the bishop can influence that choice quite easily.

Even if we assume, *arguendo*, that the rector has exclusive control over an assistant priest, the rector's acts are imputed to the Diocese under the principles of agency. The Diocese and the bishop have substantial control over the rector and the rector and the Diocese, in turn, have control over the assistant priest. If the rector is a subagent of the bishop, an agent of the Diocese, and the assistant priest is a subagent of either the bishop or the rector, the actions of the rector and assistant priest are imputed to Bishop Frey and the Diocese. *See Bradbury*, 815 F.2d at 1360 (stating that because an employee of the principal exploration company supervised the day-to-day activities of an "independent contractor" drilling company, evidence existed of an agency relationship between the exploration company and the drilling company); *see also* Restatement (Second) of Agency § 5 cmt. d (1958) ("A subagent performing acts which the appointing agent has authorized him to perform in accordance with an authorization from the principal is an agent of the principal. . . . Furthermore, the subagent stands in a fiduciary relation to the principal, and is subject to all the liabilities of an agent to the principal. . . .").

chological evaluations of candidates for ordination, and provide information about individuals who are being considered for clergy positions in the parish. While the individual priests and parishes may be independently responsible for their day-to-day activities, the Diocese exercises an employment option in the hiring of its pastors.

Gary Richard Schoener (Schoener), an expert in pastoral counseling and care and treatment of priests who have had sexual contact with parishioners, testified that the structure of the Episcopal Church was such that the Diocese had substantial control over hiring, compensation, counseling by priests, and discipline of priests.[19]

Schoener also testified that the Diocese is represented by the bishop. His testimony included a description of the bishop's role in the Diocese's hiring process:

> First of all, the diocese and specifically the Bishop basically keeps some degree of awareness of what is going on in the training of a potential priest. The priest sent from here to a seminary stays in contact, periodically lets the bishop know how things are going in the seminary training or in the practical experience that is connected with that. In addition, periodic reports are made by the seminary or the people overseeing the actual pastoral counselor training experience to the bishop describing how the person is doing, how they are progressing and including problems or inadequacies in their work. The diocese does set policies and standards for the review of the

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[19] Schoener testified that his services had been utilized by the Episcopal Church on a number of occasions and that he serves on a faculty that trains bishops, priests, and lay people to be leaders in the Episcopal church. In addition, the Episcopal House of Bishops, which Schoener described as a national office that supports bishops around the country, refers cases of sexual exploitation of parishoners to him. The cost for instructing the diocese on issues such as counseling the pastor and communicating to the parishioners is paid for by the House of Bishops.

> person once they have finished seminary, and *the question is are we going to have one of our churches hire them.*

(Emphasis added.) He described the mechanism that "the diocese through the bishop" uses to evaluate the individuals who have completed seminary and seek employment. Part of the process includes having the potential priest undergo psychological evaluations. The Diocese hires a psychologist to do the evaluation and, in addition to the psychologist's own report, the Diocese requires the psychologist to complete a form supplied by the Diocese.[20] Thus, the Diocese has a mechanism for directing the psychologist's assessment.

Schoener acknowledged that the vestries make the final hiring decision but "[t]he vestries or the managing bodies of the Episcopal congregation [are] counting on the bishop for checking out the clergy. Although they do the actual hiring, they assume they are being given candidates who have a clean bill of health." Schoener noted vestries "don't do the sort of screening that an employer might do with a certain amount of detailed background check. That's presumed to be done by the diocese." He explained the control the Diocese has over the hiring process by noting, "it is the bishop and the diocese that determines in effect who is available to be called by a congregation [i.e.,] to be considered to be hired. You can't just submit your name because you finished a seminary and be available to be hired."

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[20] Because the Diocese assumes this screening role, it keeps all the records on the candidates. The Diocese's file led Schoener to conclude:

> [The Diocese] had a fair degree of knowledge of his background during his training process, some of the problems [Father Robinson] had. . . . they had as is their job, helped work out a game plan for him to get a job, to get a decent salary, and served in the role as a helper to he and his family, to help him come back to Colorado and get a position and to get paid decently.

The evidence of the Diocese's control does not end with the evidence of its substantial input in the hiring decisions. The bishop's role, Schoener said, also includes input into the priest's compensation.

> the bishop is expected to, and in this case in fact did, look after the well-being of priests and their families as regards what kind of money they get paid. For example, the bishop may not concur with an offer being made to a priest simply because the pay is not adequate or benefits are not adequate. And this file demonstrates that quite well. There is quite a bit of correspondence around money and benefits, *and that's the key thing that the priest looks to the bishop to help with. . . .*

(Emphasis added.)

The bishop's control over the manner in which priests conduct their activities also includes the bishop's substantial input on discipline decisions. Schoener testified that the bishop could propose discipline and because of his "considerable influence," the vestry would comply with his recommendation:

> I guarantee you if you want the bishop to walk over to the vestry, which is the managing body, and say you have a problem here. We have to do something about it. He has to go on medical leave for a period of time until we sort this out. The likelihood the vestry will say no is very, very slim. It is an extraordinary rather rare case where if a bishop says this is what you really should do, they don't do it. Now, bishops come to me with frustrations sometimes because the churches don't do it quickly enough. The bishop often realizes the kind of liability the Diocese has and wants something done quickly, beyond dragging their feet. I haven't known a Diocese or congregation at any time to say no [to the bishop].

He pointed out that Bishop Frey addressed seven cases of sexual misconduct by priests and that his recommendations regarding discipline had been followed in all seven cases. Schoener's testimony is supported by the testimony of Father Myers who acknowledged that the bishop is the final authority in all disciplinary matters.

In addition to controlling certain aspects of hiring, compensation, and discipline, the Diocese also controls and supervises the duties of priests in their role as counselors. Schoener stated that the Diocese sets standards and rules regarding pastoral counseling and that priests "look to the diocese for some rules around pastoral counseling, . . . that's where they see the rules coming from." Schoener specifically noted that Bishop Frey indicated he had given talks about national issues or standards to the priests in the Diocese. In addition, Father Farr testified that the Diocese had specific printed regulations on pastoral counseling and that these regulations describe the form counseling should take. The regulations include such details as how appointments are to be kept, what attire is to be worn, where in the room the prayer book and desk should be, and even how the pastor should sit.

All of these facts indicate that a priest is not independent of the Diocese but is controlled by the Diocese and the bishop. The priest's education is monitored by the bishop, he is put through a screening for hire by the Diocese which includes psychological evaluation. The priest's compensation is affected by the bishop, the priest's discipline is controlled by the bishop, and every part of the form of the priest's counseling is regulated by the Diocese. The evidence at trial created a factual issue regarding whether an agency relationship existed. The trial court properly submitted this issue to the jury for determination and the jury found that there was an agency relationship between Father Robinson and the Diocese.

Because an agency or employment relationship existed between the Diocese and Father Robinson, and Father

Robinson's duties included a close relationship with parishioners, the Diocese could be liable for negligent hiring and supervision. Liability of the employer is predicated on the employer's antecedent ability to recognize a potential employee's "attribute[s] of character or prior conduct" which would create an undue risk of harm to those with whom the employee came in contact in executing his employment responsibilities.[21] *Connes,* 831 P.2d at 1321. An employer has a duty to exercise reasonable care in making his decision to hire. *Connes,* 831 P.2d at 1320; *Island City Flying Service v. General Elec. Credit Corp.,* 585 So.2d 274, 278 (Fla.1991); *Plains Resources, Inc. v. Gable,* 235 Kan. 580, 682 P.2d 653, 662 (1984). The scope of the employer's duty in exercising reasonable care in a hiring decision depends on the employee's anticipated degree of contact with other persons in carrying out the duties of employment. *Connes,* 831 P.2d at 1321. The requisite degree of care increases, and may require expanded inquiry into the employee's background, when the employer expects the employee to have frequent contact with the public or when the nature of the employment fosters close contact and a special relationship between particular persons and the employee. *See id.* at 1322 (stating that employers who expect their employees to have frequent or close contact with others are required to go beyond the job application and perform an independent inquiry into the background of the candidate);

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[21] Bishop Frey and the Diocese contend that in order to establish a claim of negligent hiring, the plaintiff must show that the employer was aware of the employee's specific propensity and that the employee has a history of criminal, tortious or otherwise dangerous conduct. We disagree. Liability for negligent hiring is not based on past conduct alone, but may also be based on character attributes of the employee. In *Connes,* we held that liability may be predicated on the employer's hiring of a person where the employer believes that the person by "reason of some *attribute of character or prior conduct,* would create an undue risk of harm to others in carrying out his or her employment responsibilities." *Connes,* 813 P.2d at 1321 (emphasis added).

Restatement (Second) of Agency § 213 cmt. d (1958) ("If, however, the work is likely to subject third persons to serious risk of great harm, there is a special duty of investigation.").

The duty is increased in this case because the Diocese placed Father Robinson in a position that required not only frequent contact with others, but induced reliance and trust through the counseling process. A parishioner in pastoral counseling may develop a deep emotional dependence on a priest. *See Ferguson v. People*, 824 P.2d 803 (Colo.1992). The emotional dependence is called "transference" and is a typical reaction characterized by a patient unconsciously attributing repressed feelings to the counselor. Transference is one of the most significant concepts in therapy. *See* Noyles & Kolb, *Modern Clinical Psychiatry* 505 (6th ed. 1963), *quoted in Simmons v. United States*, 805 F.2d 1363, 1365 (9th Cir. 1986). A counselor must be capable of addressing these feelings, both loving and hostile.[22] *See Simmons*, 805 F.2d at 1365 (noting the counselor should look for manifestations of the transference and be prepared to handle it as it develops).

Father Robinson's duties included counseling and close association with parishioners at the church. The Diocese was in possession of a psychological report which concluded that Father Robinson has a "sexual identification ambiguity."[23] Another psychological report indicated

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[22] Courts have routinely regarded the mishandling of transference as malpractice or gross negligence. *See, e.g., Vigilant Ins. Co. v. Employers Ins. of Wausau*, 626 F.Supp. 262 (S.D.N.Y.1986); *Aetna Life & Casualty Co. v. McCabe*, 556 F.Supp. 1342 (E.D. Pa.1983); *Waters v. Bourhis*, 40 Cal.3d 424, 220 Cal.Rptr. 666, 709 P.2d 469 (1985); *Seymour v. Lofgreen*, 209 Kan. 72, 495 P.2d 969 (1972); *L.L. v. Medical Protective Co.*, 122 Wis.2d 455, 362 N.W.2d 174 (1984).

[23] At trial a clinical psychologist testified:

> Dr. Dolby [the psychologist filing the report on Father Robinson] makes a statement [Father Robinson] has a history of

that Father Robinson had a problem with depression and suffered from low self-esteem.[24] An expert testified that a large number of clergy who have sexual relationships with their parishioners do so partially as a result of suffering from depression and low self-esteem. Father Robinson's struggle with his sexual identity and his problems with depression and low self-esteem put the Diocese on notice to inquire further whether Father Robinson was capable of counseling parishioners. These reports gave the Diocese a reason to believe Father Robinson should not be put in a position to counsel vulnerable individuals and that might be unable to handle the transference phenomenon. The failure to communicate this knowledge to the vestry and subsequent placement of Father Robinson in the role of counselor breached the Diocese's duty of care to Tenantry.

B

The jury also found the Diocese was negligent in its supervision of Father Robinson. The Restatement (Second) of Agency section 213 (1958) states:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
>
> . . . .

(c) in the supervision of the activity . . . . Comment d states:

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sexual identification ambiguity. Although he says that [Father Robinson] functions exclusively as a heterosexual both physically and in fantasy. His marriage is apparently satisfying. I don't understand what that means. Obviously, it would be of some concern to know if he is having any sort of struggle in the area of sexual identity. That is something that I think a reasonably prudent bishop or anyone else reading this would want to know what that meant, what is the issue that has been found here.

[24] There were two psychological reports presented at trial that were in the possession of the Diocese. The first was dated June 9, 1980, and the second April 25, 1983.

> The principal may be negligent because he has reason to know that the servant or other agent, because of his qualities, is likely to harm others in view of the work or instrumentalities entrusted to him. If the dangerous quality of the agent causes harm, the principal may be liable under the rule that one initiating conduct having undue tendency to cause harm is liable therefor.

An employer may therefore be subject to liability for negligent supervision if he knows or should have known that an "employee's conduct would subject third parties to an unreasonable risk of harm. . . ."
Destefano, 763 P.2d at 288.

Both the Diocese and Bishop Frey had previous exposure to the problem of sexual relationships developing between priests and parishioners because the problem had arisen seven times before. The psychological reports gave notice that further supervision may be required. The reports indicate problems of sexual identification ambiguity, depression and low self-esteem. Father Robinson's file also indicated he had problems with authority. Father Robinson had an inability to respond to superior authority. A reasonable person would have inquired further into Father Robinson's known difficulty in dealing with superior authority, and would have assumed a greater degree of care in monitoring his conduct. In light of its knowledge, it was reasonable for the jury to determine the defendants should have been alert to the possibility of problems with Father Robinson and taken adequate steps to insure Father Robinson was not in a position where he could abuse the trust he enjoys as a priest conducting counseling.[25]

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[25] Father Robinson testified that he did not have any guidance on how his office could adversely affect the people he counseled. He also testified that the church does not have any procedures for priests to follow when they have trouble in counseling nor does the church have any procedure for addressing romantic or physical relationships between priests and parishioners. Father Robinson

V

The jury determined that the Diocese and Bishop Frey were vicariously liable for Father Robinson's tortious conduct. Father Robinson, however, was not acting within the scope and course of his employment and therefore the Diocese and Bishop Frey are not vicariously liable.[26]

The agency doctrine of vicarious liability is based on the theory of respondeat superior which postulates that a master may be liable for the acts of an agent acting on the master's behalf. *Connes*, 831 P.2d at 1320-21; *Cooley v. Eskridge*, 125 Colo. 102, 241 P.2d 851 (1952); Restatement (Second) of Agency § 213 (1958). An employer may be held vicariously liable for an employee's tort only when the tort is committed within the course and scope of employment.[27] *Destefano*, 763 P.2d at

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stated that the only assistance for a troubled priest is the tradition of seeking the help of the bishop.

[26] As noted *supra* part IV(A), the jury had sufficient evidence to find that Father Robinson was an agent of the Diocese.

[27] The scope of employment requirement restricts vicarious liability for tortious conduct to actions that "should be considered as one of the normal risks to be borne by the business in which the servant is employed." Restatement (Second) of Agency § 229 cmt. a (1958). Although the commission of an intentional tort may sometimes be within the scope of employment, the agent's intent in committing the tortious act must be to further the employer's business. *See Cooley v. Eskridge*, 125 Colo. 102, 112, 241 P.2d 851, 856 (1952) (stating authority to do an unlawful act will not be implied unless it is warranted from the nature of the employment itself) (citations omitted); *Byrd v. Faber*, 57 Ohio St.3d 56, 565 N.E.2d 584, 587 (1991) (giving the example that a bar owner employing a bouncer may be vicariously liable to patron if the bouncer injures the patron while removing him from the premises). However, if an employee commits an intentional tort solely for reasons that do not further his employer's business or cannot be considered a natural incident of employment, the employer cannot be vicariously liable. *Cooley*, 125 Colo. at 114, 241 P.2d at 857. The scope of employment limitation on vicarious liability partially distinguishes vicarious liability from the tort of negligent hiring. *See supra* note 16.

286; *McDonald v. Lakewood Country Club,* 170 Colo. 355, 461 P.2d 437 (1969). An employee is acting within the scope of his employment if he is doing the work assigned to him by his employer, or what is necessarily incidental to that work, or customary in the employer's business. *Destefano,* 763 P.2d at 287; *Russell v. First Am. Mortgage Co.,* 39 Colo.App. 360, 565 P.2d 972 (1977). We have previously held "[w]hen a priest has sexual intercourse with a parishioner it is not part of the priest's duties nor customary within the business of the church. Such conduct is contrary to the principles of Catholicism and is not incidental to the tasks assigned a priest by a diocese." [28] *Destefano,* 763 P.2d at 287; *see also Dausch v. Rykse,* 1993 WL 34873, 1993 U.S. Dist. LEXIS 1448 (N.D.Ill., Feb. 9, 1993 ("When a clergyman has sexual relations with a parishioner, particularly when he is counseling the parishioner for emotional problems, his actions would clearly not be part of his ministerial duties nor customary within the business of the church." (citations omitted)).

There is no evidence in the record to support Tenantry's contention that Father Robinson was acting in the scope of his employment by engaging in oral sex with her.[29] In fact, the evidence in the record establishes that

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[28] We do not find the distinction between the Catholic priest in *Destefano,* who takes a vow of celibacy, and Episcopal priests, who are free to marry and engage in sexual acts, to be dispositive. Regardless of the denomination, when a priest engages in oral sex with a mentally ill parishioner, the priest is not acting within the scope of employment.

[29] Although it is evident that a priest who engages in tortious sexual contact with a parishioner under the facts in this case is not acting within the scope of his employment, Tenantry nevertheless claims that the Diocese is vicariously liable because it was foreseeable that Robinson would mishandle the transference phenomenon. There is some support for the theory that reasonable foreseeability can establish vicarious liability. In *Milla v. Roman Catholic Archbishop of Los Angeles,* 187 Cal.App.3d 1453, 232 Cal.Rptr. 685 (1986), the California appellate court found that a

Father Robinson was not acting within the scope of his employment by engaging in fellatio and cunniligus with Tenantry. Bishop Frey testified that Father Robinson's conduct was a "serious breach of [his] ordination vows." Father Robinson testified that his physical relationship was not within the scope of his employment with the church. Even Tenantry's own experts testified that Father Robinson's sexual conduct was outside the scope of his priestly duties.[30]

Catholic Archdiocese could be held liable under the theory of respondeat superior for several priests' sexual contact with a parishioner if their conduct was characteristic of the activities of the church or reasonably foreseeable. This concept was adopted in *Byrd*, 565 N.E.2d at 588. While the phenomenon of transference is foreseeable, we do not wish to expand the concept of vicarious liability as the California appellate or Ohio supreme court did. Expanding vicarious liability of a religious organization to cover foreseeable acts may well intrude into the First Amendment of the United States Constitution. Rather, the phenomenon of transference is better dealt with in this case through the claim of negligent hiring and supervision.

[30] Questions 8, 9, and 10 of the special verdict form completed by the jury read as follows:

> QUESTION NO. 8. Was Robinson an agent of the defendant Diocese?
>
> ANSWER: Yes
>
> QUESTION NO. 9. If the answer to number 8 is "yes," was defendant Robinson acting within the course and scope of his agency during the events regarding Mary Tenantry?
>
> ANSWER: Yes
>
> QUESTION NO. 10. If the answer to number 9 is "yes," continue at question 11. If the answer to number 9 is "no," did the defendant Diocese ratify non-party Robinson's actions in connection with the events regarding Mary Tenantry?
>
> ANSWER: ——

Based upon the answers to questions 8 and 9, it was not necessary to answer question 10 on ratification and question 10 was crossed out by the jury. Accordingly, we do not address the issue of whether the Diocese ratified Father Robinson's actions.

The jury's finding that Robinson was acting within the scope of his employment when he had tortious sexual conduct with Tenantary is erroneous as a matter of law. The Diocese is not vicariously liable for Robinson's acts of oral sex with Tenantry. We therefore order the trial court to vacate its judgment holding the Diocese and Bishop Frey vicariously liable for Father Robinson's acts.[81]

VI

The judgment entered by the trial court is affirmed in part and reversed in part. We affirm the trial court judgment against the Diocese and Bishop Frey for breach of fiduciary duty, negligent hiring and supervision. We reverse the judgment that the Diocese and Bishop Frey are vicariously liable for the acts of Father Robinson and order the trial court to vacate the judgment predicated on the jury's finding of vicarious liability and the damages based on vicarious liability.

ROVIRA, C.J., concurs in part and dissents in part.

Chief Justice ROVIRA concurring in part and dissenting in part:

The majority holds that sufficient evidence was presented at trial to create a question for the jury regarding whether an employment or agency relationship existed between the Diocese of Colorado (diocese) and Father Paul Robinson and therefore, the diocese may be liable

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[81] An erroneous portion of a judgment may be set aside if susceptible to segregation, and the remainder of the judgment may be affirmed. *Department of Transportation v. Kendricks*, 148 Ga.App. 242, 250 S.E.2d 854, 859 (1978); *Chicago, Indianapolis & Louisville Ry. Co. v. Brown*, 157 Ind. 544, 60 N.E. 346 (1901). In this case, the jury findings in the trial court's special verdict form specifically awarded $488,400 in past and future damages and interest to Tenantry for the Diocese's vicarious liability for the acts of Father Robinson. It is this portion of the judgment we vacate.

for the negligent hiring and supervision of Robinson.[1] For the reasons set forth below, I disagree and, accordingly, respectfully dissent.

I

Mary Moses (plaintiff) was a parishioner at St. Philip and St. James Episcopal Church. Father Vernon Meyers was the head priest and rector of that parish. Father Paul Robinson was employed as an assistant priest at St. Philip and St. James. The parish is one local body of the Episcopal Diocese of Colorado. Bishop William Frey was the head of the diocese.[2]

II

The majority correctly observes that "a prerequisite to establishing [a claim of] negligent hiring is an employment or agency relationship." Maj. op. at 324. Though not expressly stated by the majority, a finding of employment or agency, similarly, is a prerequisite to a claim of negligent supervision. *See* Restatement (Second) of Agency § 213 (1958). The question of agency is ordinarily a factual one, properly resolved by the trier of fact when conflicting evidence of agency is presented. *Stortroen v. Beneficial Fin. Co.*, 736 P.2d 391, 395 (Colo. 1987). A court may, however, properly decide whether an agency relation exists when the relevant facts are not in dispute. *Id.*

While the majority points to several facts in support of its conclusion that the evidence presented was sufficient to create a factual dispute respecting whether the relationship between the diocese and Father Robinson was

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[1] It is unclear whether the majority concludes that the evidence supports a finding of either agency or employment, or both. Because the requirements for finding an employer-employee relation differ from those needed to find an agency relation—but either finding could support a claim for negligent hiring and supervision—I address each issue separately.

[2] Other relevant facts and information are detailed in the majority opinion, repetition of which is unnecessary here.

one of either agency or employment, those facts do not create such a dispute because they have no bearing on the critical elements needed to establish the existence of either of these legal relationships. Because the evidence pertaining to those decisive elements was undisputed and cannot, as a matter of law, support a finding of an agency or employment relationship, the Diocese of Colorado cannot be held liable for the negligent hiring and supervision of Father Robinson.

A

"Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Stortroen v. Beneficial Fin. Co.*, 736 P.2d 391, 395 (Colo.1987) (quoting Restatement (Second) of Agency § 1(1) (1957). *See also Montano v. Land Title Guarantee Co.*, 778 P.2d 328, 331 (Colo.App.1989).

> The agency relation results if, but only if, there is an understanding between the parties which, as interpreted by the court, creates a fiduciary relation in which the fiduciary is subject to the directions of the one on whose account he acts. *It is the element of continuous subjection to the will of the principal which distinguishes the agent from other fiduciaries and the agency agreement from other agreements.*

Restatement (Second) of Agency § 1 cmt. b (1958) (emphasis added); *United States v. Young*, 736 F.2d 565, 567-68 (10th Cir.1983) *rev'd on other grounds*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (holding that a showing of mere subordination to another is insufficient to establish agency or employment; the "right to control" must be shown under common law requirements); W. Edward Sell, *Sell on Agency* § 2 at 2 (1975) ("The agent differs from most other fiduciaries such as executors, trustees, etc., in that he remains under the continuous control of the principal as to matters relating to the ob-

ject of his agency, throughout the entire period of his agency."); 2A C.J.S. *Agency* § 6 (1972) ("The right to control . . . is the primary or essential test of agency . . . without which no agency exists. . . ."). As this authority makes clear, the *sine qua non* of the agency relationship is the right of continuous control by the principal over the acts of the agent. Thus, I agree with the majority's conclusion that "[t]he most important factor in determining whether a person is an agent is 'the right to control, not the fact of control.'" Maj. op. at 324 (quoting *Dana's Housekeeping v. Butterfield*, 807 P.2d 1218, 1220 (Colo. App.1990)).

The uncontradicted evidence presented at trial established that the diocese neither had the right of continuous control over Father Robinson nor exercised that "right." Indeed, no evidence was presented which created even the inference that the diocese was vested with such power over Father Robinson. Canon 14(a) of the Episcopal Church provides that "[a]ll assistant Clergy . . . shall be selected by the rector . . . and shall serve under the authority and direction of the Rector." *Constitution & Canons for the Government of The Episcopal Church* Title III, canon 14(a) at 80 (1988). Numerous witnesses testified that it was the rector at St. Philip and St. James Parish who gave Father Robinson his assignments and who instructed him as to how to carry out his day-to-day duties. Those same witnesses testified that those day-to-day activities would be supervised and controlled by the rector, and not the diocese or the bishop. Father Charles Farr,[3] Father Meyers, and Gary Schoener,[4] all were in complete agreement on these points. In short, the evidence established, as the

[3] Father Farr, who testified on behalf of plaintiff, was the rector at the Church of the Epiphany, another Episcopal Church located in Denver.

[4] Schoener, who was qualified as an expert in the area of pastoral counseling and the care and treatment of offending priests, also testified on behalf of plaintiff.

majority concedes, that individual rectors are "independently responsible for their [assistant priests'] day-to-day activities." Maj op. at 325.

The fact that the individual rectors, and not the bishop or diocese, are charged with overseeing the day-to-day activities of assistant priests weighs heavily against a finding that an agency relation exists. *See* Restatement (Second) of Agency § 1 cmt. b (1958); maj. op. at 325. The power to control and oversee Robinson's day-to-day activities is the method which, by definition, continuous control is exerted over him. Because it was the rector at St. Philip and St. James, and not the bishop or diocese, who exerted continuous control over Robinson, I would hold that no evidence was presented at trial to support the jury's verdict that an agency relation existed between Robinson and the diocese and that, as a matter of law, no such relation was established here.

B

The majority additionally concludes that "the Diocese exercises an employment option in the hiring of its pastors." Maj. op. at 325. Like continuous control in the context of agency, the power of continuous control is a critical element, or prerequisite, to finding an employer-employee relationship. *Jacobson v. Doan*, 136 Colo. 496, 503, 319 P.2d 975, 978 (1957) ("The determination of whose servant an employee is in a given case depends on who has the right to control him."); *Magnuson v. Smith and Saetveit, P.C.*, 722 P.2d 1020, 1022 (Colo.App. 1986) ("The central element in an employer-employee relationship is the right of the employer to control the details of performance of the employee's duties."); *Miller v. Hirschbach Motor Lines, Inc.*, 714 S.W.2d 652, 658 (Mo.App.1986) (control over discharge of duties is a "preeminent characteristic" of employer-employee relationship). *See also* Restatement (Second) of Agency § 220 (1958). Other particularly probative indicators of an employment relationship include the power to hire and

terminate, *see e.g. King v. Southwestern Greyhound Lines*, 169 F.2d 497, 499 (10th Cir.), *cert. denied*, 335 U.S. 891, 69 S.Ct. 245, 93 L.Ed. 428 (1948) (noting that numerous courts have held that the right to terminate a contract for services creates an employer-employee relationship as a matter of law); *Hirschbach Motor Lines, Inc.*, 714 S.W.2d at 658 ("no single fact is more conclusive of the existence of the nature of the employment [relationship] than the right to discharge summarily"), and whether the purported employer pays the salary of or otherwise compensates the alleged employee. *See Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957). In sum, the dispositive elements needed to show an employer-employee relationship are:

> whether [the alleged employer] selected or employed [the employee]; whether wages or other consideration were to be paid; whether [the alleged employer] had the power or right to dismiss and the right to control [the alleged employee]. The central element is the right to control the details of performance.

CJI-Civ.3d 7:6 (1989).

As noted above, the undisputed evidence reveals that the diocese neither had nor exercised the right to control Father Robinson's day-to-day activities. Similarly, the undisputed evidence established that the diocese did not have the power or authority to either hire or terminate Father Robinson. Canon 14(a) provides that "[a]ny assistant selected shall serve at the discretion of the Rector. . . ." *Constitution & Canons for the Government of The Episcopal Church* Title III, canon 14(a) at 80 (1988). Father Farr testified that an assistant priest serves at the pleasure of the rector, and only the rector can terminate the priest. Father Farr also stated that a bishop's approval is not needed prior to termination. Schoener testified that Bishop Frey did not have the authority to remove Father Robinson from his priestly duties. Rather, Schoener testified that "in that regard

the church is the direct supervisor of that, they have to make that decision."

Marie Fortune, another expert who testified on behalf of plaintiff, acknowledged that it was Father Meyers who presented Father Robinson to the vestry with the recommendation that he be hired. Meyers also conceded that the diocese had no "vote" in that matter. Furthermore, Meyers agreed that an assistant priest serves at the pleasure of the rector, and it is he who is charged with determining the priest's employment status.

Finally, it was undisputed that the parish, acting through its vestry, was the entity which compensated Robinson for his services, and not the diocese or Bishop Frey. Again, Bishop Frey, Father Farr, and Father Meyers all confirmed this fact.

The diocese did not have the power to control Father Robinson's day-to-day activities. Nor did it have the power or authority to initiate or terminate Robinson's employment with the parish.[5] Finally, it was the parish of St. Philip and St. James that was responsible for compensating Robinson, not the diocese.

Thus, I am of the opinion that the uncontradicted evidence precludes, as a matter of law, a finding that the diocese and Father Robinson occupied an employer-employee relationship.

III

The majority, however, points to number of facts about the structure of the Episcopal Church and places primary reliance on the testimony of Schoener in support of the

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[5] In my opinion, it strains credulity to conclude that one who lacks the power either to hire or terminate an "employee" can nevertheless occupy the position of employer with respect to hiring that employee. I for one am unable to see how the diocese could have been negligent in *hiring* Father Robinson when the undisputed evidence established not only that the diocese could not, but, in fact did not, hire Robinson.

conclusion that sufficient evidence was presented to create a jury question as to whether Robinson was either an agent or employee of the diocese. In my opinion, none of those facts support the conclusion for which they are enlisted, because none of them relate to the critical elements needed to establish an agency or employment relationship. The facts presented by the majority fall into two broad categories, each of which will be addressed in turn.

A

The first category of facts on which the majority relies in reaching its conclusion concerns the relationship among a diocese, bishop, and rector or head priest of a parish. Maj. op. at 325-326. Standing alone, all of these facts are entirely irrelevant to determining the legal relationship between Robinson and the diocese because Robinson was an assistant priest, not a rector. As common sense would suggest, extensive and uncontroverted evidence was presented at trial to establish that an assistant priest is not a rector, and that the duties, responsibilities, and supervisory relationships of rectors and assistant priests differ.

The majority apparently cites these facts, not to show that assistant priests and rectors are one and the same, but to establish that the doctrine of subagency is applicable here and that therefore, Robinson's conduct as a subagent of Meyers, who is an agent of the diocese, can be imputed to the diocese. Maj. op. at 325 n. 18.

The doctrine of subagency is set forth in the Restatement of Agency as follows: "A subagent is a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible for." Restatement (Second) of Agency § 5(1) (1958). In order to establish a subagent relation, it must be shown that the agent of the principal had agreed to be primarily responsible for the conduct of

the alleged subagent. *See id.; Estate of Greenberg v. Skurski*, 95 Nev. 736, 602 P.2d 178, 179 (1979). In my opinion, while the doctrine of subagency could have been relied on here, the fact is, it was not.

The only instruction concerning the establishment of either an agency or employment relationship which the trial court tendered was Jury Instruction 23. That instruction provided:

> The term principal and agent refers to the relationship which exists when one person, the principal, retains another, the agent, to do certain work. In determining whether the relationship exists you should consider whether the Diocese of Colorado and/or Bishop William Frey selected or retained Father Robinson; whether wages or other consideration were to be paid by them; whether the Diocese of Colorado and/or Bishop William Frey had the power or right to dismiss and the right to control Father Robinson. The central element is the right to control the details of performance. It matters not whether the Diocese of Colorado and/or Bishop William Frey actually exercised any right to control Father Robinson.

This was the only instruction proffered to the jury regarding the question of how, and whether, an agency or employment relationship exists. Consequently, no other possible legal bases for finding such relationships under the facts of this case could have been considered by the jury in reaching its verdict. Because the jury could not have concluded that Robinson was a subagent of the diocese, evidence which tends to establish subagency cannot be used to establish that evidence was presented either to create a question for the jury or to support the jury's verdict. Therefore, the majority's reliance on this first category of evidence is, in my opinion, misplaced, and in no way supports the conclusion that sufficient evidence was presented to create a jury question.

B

The second category of evidence cited by the majority concerns the relationship among the diocese, bishop, and assistant priests, and is culled almost exclusively from the testimony of Gary Schoener. While I concede that the evidence cited by the majority establishes that a bishop can exert *influence* over assistant priests, such influence falls far short of establishing the requirements needed to prove an agency or employment relationship.

First, it is important to reiterate that the majority does not contend that either the bishop or diocese controlled the day-to-day activities of Father Robinson. Maj. op. at 325. Rather, the majority concedes that "individual priests and parishes may be independently responsible for [assistant priests'] day-to-day activities. . . ." *Id.*[6] In spite of the fact that this critical element is lacking, the majority nevertheless concludes that the "Diocese exercises an employment option in the hiring of its priests." *Id.*

The majority notes that "[t]he rector supervises an assistant priest's counseling duties. . . ." Maj. op. at 325. This is indicative of the fact that it is the rector, and not the bishop or diocese, that exerts continuous control over assistant priests. The fact that those counseling duties "are specifically prescribed by regulations promulgated by the Diocese," *id.*, in no way alters this conclusion for the simple reason that pastoral counseling is only one of myriad duties and activities in which an assistant priest engages. In addition, this fact has no bearing on the

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[6] While the majority acknowledges this fact, it nevertheless concludes that "Bishop Frey had and exercised the right of control over the manner of work performed by a priest as well as the hiring, compensation, and counseling performed by the priest and discipline." Maj. op. at 325. Irrespective of whatever inconsistency there may be in maintaining both of these propositions simultaneously, for the reasons that follow, I disagree that Bishop Frey had or exercised the right of control as described by the majority.

question of the power to hire, terminate, or compensate assistant priests.

Similarly, though a priest may look to the bishop for "pastoral care," *id.*, this fact is inapposite to the question of whether the bishop exerts continuous control over the conduct of the assistant priest. In fact, Schoener testified that an assistant priest would consult with a bishop only in exceptional circumstances. Likewise, even if the bishop has "independent responsibility" for the employment of assistant priests (including overseeing ordination, discipline, counseling, and maintenance of personal files), *id.*, the sort of independent responsibility identified by the majority has no relevance to the question of whether the diocese exerts continuous control over the daily conduct of assistant priests, whether the diocese has the power to actually hire and terminate assistant priests, or whether the diocese compensates assistant priests. Finally, the fact that vestries rely on the bishop and diocese to prepare candidates and provide information about them is entirely irrelevant to the questions of control, employment decisions, and duty to compensate.

In addition to the aforementioned facts, the majority quotes at length the testimony of Schoener as it related to his "description of the bishop's role in the Diocese's hiring process. . . ." Maj. op. at 326, 326-327. Though I acknowledge that the Diocese does indeed play a role in the hiring of assistant priests—i.e., having "substantial input in the hiring decisions," maj. op. at 327—the majority fails to point to any evidence which established that the diocese is actually vested with the authority to hire or terminate assistant priests.

The closest the majority comes to pointing to such evidence is Schoener's statement that "it is the bishop and the diocese that determines in effect who is available to be called by a congregation [i.e.,] to be considered to be hired. You can't just submit your name because you finished a seminary and be available to be hired." Maj.

op. at 326. However, Schoener also acknowledged that a given diocese determines who is available to be called only if a parish looks to that diocese for hiring guidance. Schoener stated that a parish is not bound to look only to candidates who have been approved by that parish's diocese. In fact, Schoener stated that in most states, local parishes look outside their own diocese for assistant priests. Furthermore, Schoener testified that St. Philip and St. James was in no way required or obligated to look only to the Diocese of Colorado for eligible candidates. Thus, a given diocese actually exerts much less influence in the hiring process than one could otherwise be led to assume. The majority, however, apparently misconstrues the extent to which a given parish is dependent on its diocese in the hiring of assistant priests, by concluding that the Diocese of Colorado exercises an employment "option," maj. op. at 326, with respect to the hiring of assistant priests at the diocese's parishes.

The majority also paraphrases Schoener's testimony regarding the influence a bishop may exert over disciplinary decisions as follows: "the bishop could propose discipline and because of his 'considerable influence,' the vestry would comply with his recommendation. . . ." Maj. op. at 327. Schoener did indeed testify as to the influence a bishop could exert in such matters, however he stated only that the likelihood of a vestry ignoring a bishop's advice was "very, very slim." Nevertheless, he acknowledged not only that sometimes parishes do not follow the advice of a bishop quickly enough but specifically recognized that vestries and churches do not always follow the advice of a Bishop: "If you talk to bishops," Schoener stated, "you will learn about that." Regardless of the precise scope of a bishop's influence in matters of discipline, nowhere was it ever suggested that such influence rises to the level of continuous control or that such influence extends to the actual hiring, termination, or duty to compensate assistant priests.

Finally, the fact that an assistant "priest's compensation is affected by the bishop," has nothing to do with the critical elements needed to establish an agency or employment relationship. The ability to affect the rate of compensation certainly cannot be equated with the power to actually hire or terminate employment. Nor is this ability to "affect" tantamount to a duty of compensation. The jury was specifically instructed that they should consider "whether wages or other consideration were to be paid by them [i.e., Bishop Frey or the diocese]," in determining whether an employment relation existed between Robinson and the diocese. *See supra* p. 334-335 (quoting Jury Instruction 23). The jury was not instructed to consider whether the diocese could "affect" the rate at which Robinson was compensated and therefore, the fact of such an ability cannot create a dispute properly resolved by the jury. Furthermore, it was undisputed that the bishop and diocese did not compensate Robinson, but that the parish, acting through its vestry, did.

C

Thus, the considerable number of facts and lengthy testimony cited by the majority do not support the conclusion that the diocese was either the principal or employer of Father Robinson, because none of those facts establish that the diocese had continuous control over Robinson, was vested with the power to terminate his employment with the parish, or had the duty to compensate him for his services.[7] Though these facts do establish that Bishop

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[7] This conclusion is supported by recognition that, standing alone, many of the facts cited by the majority occur in contexts which could in no way be regarded as agency or employment relations. For example, to the extent that the bishop oversees ordination, discipline, and the maintenance of personal files on prospective assistant priests, he is not unlike this court, which is vested with the power and obligation to oversee the admittance, discipline, and maintenance of personal files on members of the Colorado Bar. Similarly, to the extent that vestries rely on the diocese to prepare and educate candidates, they are not unlike government agencies

Frey and the diocese were capable of exerting influence over the conduct of an assistant priest, such an ability cannot establish either an agency or employment relationship nor can it create a factual dispute as to whether such relationships exist.

The jury was properly instructed that in order to find an employment relation between the diocese and Robinson, they should consider whether: (1) the diocese selected or retained Robinson; (2) wages or other consideration were to be paid by them; (3) the diocese or bishop had the power to terminate Robinson; and (4) the diocese or Bishop Frey had the right to control Robinson. *See supra* p. 334-335 (quoting Jury Instruction 23). The majority concedes that the fourth, and "critical," element of control is wanting here because it is the rector who controls an assistant priest's day-to-day activities. Furthermore, the majority nowhere states or concludes that the diocese hired Robinson, had the duty to compensate Robinson, or had the actual ability to terminate Robinson's employment with the parish.

In short, the majority never contends that *any* of the elements that the jury was instructed to consider in de-

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and law firms who rely on law schools to properly train and educate prospective attorneys. In this sense, this court and law schools are similarly vested with "independent responsibility" for the employment of lawyers. This fact does not of course, nor could it, support a conclusion that either the supreme court or law schools occupy an agency or employment relation with respect to all attorneys practicing in Colorado.

Likewise, while a bishop can "affect" an assistant priest's compensation, many people and organizations similarly affect the compensation paid to others while not occupying an employment relationship with them. For example, a labor union can affect the rate of compensation and nature of benefits paid to its members. Similarly, state and federal governments can affect the compensation of others by mandating minimum wage requirements or payment of disability or unemployment benefits. It could not, however, be argued that simply because such organizations and institutions affect the compensation paid to others in these ways, that they are therefore the employers of those affected.

termining whether an employment relation existed between the diocese and Robinson have been met here. Rather, all of the evidence cited establishes only that the bishop and diocese can exert influence over an assistant priest. The jury was not, however, instructed that "influence" alone could either support a finding of an employment relation or that such a fact should even be considered by them. Thus, the fact that such influence exists cannot support the conclusion that sufficient evidence was presented to either create a question for the jury or to support the jury's verdict.

Consequently, I would hold that the trial court erred in denying defendant's directed verdict motion dismissing plaintiff's claim for negligent hiring and supervision. Accordingly, I concur in the result in Part III, concur in Part V, and dissent from Part IV of the majority opinion.

APPENDIX B

DISTRICT COURT
CITY AND COUNTY OF DENVER
STATE OF COLORADO

Case No. 90 CV 01628
Courtroom 2

MARY ELAINE TENANTRY f/k/a MARY MOSES,
Plaintiff(s),

v.

THE BISHOP and THE DIOCESE OF COLORADO EPISCOPAL CHURCH, a Colorado corporation, and BISHOP WILLIAM FREY, Individually,
Defendant(s).

COURT'S ORDER RE: JUDGMENT
(TRIAL TO JURY)

THIS MATTER came on for trial August 19 through September 5, 1991. The jury having heard the evidence, having been instructed on the law of the case, having duly deliberated the issues, having returned answers to the interrogatories submitted to them by the Court, and the Court, being fully advised, hereby enters the following Order of Judgment herein:

IT IS ORDERED, ADJUDGED AND DECREED that pursuant to Rules 58 and 79, Colorado Rules of Civil Procedure, the Clerk of this Court shall, based on the verdict of the jury, forthwith enter upon the register of actions of the Court judgment for Plaintiff, Mary Elaine Tenantry, f/k/a Mary Moses, and against Defendants The Bishop and The Diocese of Colorado Episcopal Church, a Colorado corporation, and Bishop William

Frey, in the amount of One Million Two Hundred Sixteen Thousand Five Hundred and 00/100 Dollars ($1,216,500.00), plus interest as allowed by law, and costs to be determined.

DONE THIS 5th day of September, 1991.

/s/ Herbert L. Stern, III
HERBERT L. STERN, III
District Court Judge

APPENDIX C

DISTRICT COURT
CITY AND COUNTY OF DENVER
STATE OF COLORADO

Civil Action No. 90 CV 1628
Courtroom 2

MARY E. MOSES a/k/a MARY ELAINE TENANTRY,
Plaintiff

v.

FATHER PAUL GEORGE ROBINSON, THE BISHOP and THE DIOCESE OF COLORADO EPISCOPAL CHURCH, a Colorado corporation, and BISHOP WILLIAM FREY, individually,

Defendants.

COURT'S ORDER RE: JUDGMENT (TRIAL TO JURY)

THIS MATTER came on for trial August 19 through September 5, 1991. The jury having heard the evidence, having been instructed on the law of the case, having duly deliberated the issues, having returned answers to the interrogatories submitted to them by the Court, and the Court having heard arguments hereby enters the following Order of Judgment herein:

THE COURT FINDS PURSUANT TO RULE 54(b) that there is no just reason for delay as to the entry of final judgment as to plaintiff's claims against defendants the Diocese of Colorado and Bishop Frey; and it is hereby,

IT IS ORDERED, that pursuant to Rules 54, 58 and 79 of the Colorado Rules of Civil Procedure, the Clerk of this Court shall, based on the verdict of the jury, and legal findings of this Court, forthwith enter upon the register of actions of the Court judgment for plaintiff,

Mary Elaine Tenantry, f/k/a Mary Moses and against defendants, the Bishop and Diocese of Colorado Episcopal Church, a Colorado corporation and Bishop William Frey, jointly and severally, in the amount of One Million Seven Hundred Forty-Three Thousand Forty-Five Dollars and Ten Cents, effective as of the date of denial of the Motion for New Trial, November 1, 1991, plus continuing interest as allowed by law. The figure was arrived at as follows:

a. Principal verdict of $1,098,500.00 (Jury verdict of $1,216,500.00 minus $118,000.00 awarded above $500,000 statutory non-economic limitations).

b. Prejudgment interest as of September 5, 1991, was $602,879.89. Nine percent annum non-compounded interest on $1,098,500 is $98,865 per year from March 6, 1986 through March 5, 1989. Interest for 331 days from March 6, 1989 to February 8, 1990, is an additional $89,654.66. (Total non-compounded interest as of date of filing, February 9, 1990, is $386,249.66). Nine percent annual compounded interest on $1,484,749.60 (verdict plus non-compounded interest) from February 9, 1990 to September 5, 1991, is $216,630.23).

c. Costs of $17,507.15, as of September 5, 1991.

d. Post-Judgment interest on $1,718,886.80 through November 1, 1991, denial of Motion for New Trial was $24,158.31.

DONE AND SIGNED this 8th day of November, 1991.

BY THE COURT:

/s/ Herbert L. Stern, III
HERBERT L. STERN, III
District Court Judge

APPENDIX D

SUPREME COURT
STATE OF COLORADO

Case No. 92SA415

MARY E. MOSES, n/k/a MARY ELAINE TENANTRY,
Plaintiff-Appellee/Cross-Appellant,

v.

THE DIOCESE OF COLORADO, a Colorado corporation,
and BISHOP WILLIAM FREY,
Defendants-Appellants/Cross-Appellees.

Transfer from the Colorado Court of Appeals, 91CA2069
Appeal from the District Court, Denver County,
90CV1628

ORDER OF COURT

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, DECEMBER 6, 1993.

Chief Justice Rovira would grant the Petition.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-648

DIOCESE OF COLORADO and BISHOP WILLIAM FREY,
Petitioners

v.

MARY E. MOSES

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including April 6, 1994.

/s/ Ruth Bader Ginsburg
Associate Justice of the
Supreme Court of the
United States

Dated this 7th day of February, 1994.

APPENDIX F

PUBLIC LAW 103-141 [H.R. 1308]; November 16, 1993

RELIGIOUS FREEDOM RESTORATION ACT OF 1993

An Act to protect the free exercise of religion.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Freedom Restoration Act of 1993".

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) FINDINGS.—The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for

striking sensible balances between religious liberty and competing prior governmental interests.

(b) PURPOSES.—The purposes of this Act are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL.—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION.—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) JUDICIAL RELIEF.—A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

SEC. 4. ATTORNEYS FEES.

(a) JUDICIAL PROCEEDINGS.—Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting

"the Religious Freedom Restoration Act of 1993," before "or title VI of the Civil Rights Act of 1964".

(b) ADMINISTRATIVE PROCEEDINGS.—Section 504(b)(1)(C) of title 5, United States Code, is amended—

(1) by striking "and" at the end of clause (ii);

(2) by striking the semicolon at the end of clause (iii) and inserting ", and"; and

(3) by inserting "(iv) the Religious Freedom Restoration Act of 1993;" after clause (iii).

SEC. 5. DEFINITIONS.

As used in this Act—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

SEC. 6. APPLICABILITY.

(a) IN GENERAL.—This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) RULE OF CONSTRUCTION.—Federal statutory law adopted after the date of the enactment of this Act is

subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) RELIGIOUS BELIEF UNAFFECTED.—Nothing in this Act shall be construed to authorize any government to burden any religious belief.

SEC. 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term "granting" used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

Approved November 16, 1993.

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No. 93-1578

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE DIOCESE OF COLORADO,
A COLORADO CORPORATION, and
BISHOP WILLIAM FREY,
Petitioners,

v.

MARY E. MOSES, n/k/a MARY ELAINE TENANTRY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF PASTORAL COUNSELORS IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Amicus curiae American Association of Pastoral Counselors ("AAPC"), a nonsectarian nonprofit Missouri corporation founded in 1963 with its principal office in Fairfax, Virginia, has sought the consent of the parties to participate in this matter by the filing of the enclosed brief. The petitioners' consent letter to file this brief is on file with the Clerk in accordance with Rule 37.3, but respondents have withheld their consent, necessitating this motion. This motion and the enclosed brief are filed in support of the petitioners not only to bring relevant matter to the attention of the Court not otherwise available through the parties as required by Rule 37.1, but to emphasize to the Court the national significance to pastoral counselors of the issues presented by this case.

This Colorado case raises First Amendment issues of national significance. It was wrongly decided, reaffirm-

ing the Colorado Supreme Court's earlier adoption of an unfortunate breach of trust theory for clergy. *See Destafano v. Grabian,* 763 P.2d 275 (Colo. 1988). It seems that Colorado has found a way to compensate people for the loss of their "trust in God and the church." It is one thing for clergy counselors to be held personally liable for injuries of counselees resulting from sexual misconduct with the counselor, and quite another to reach ecclesiastical authorities with liability for aggravation of the loss of trust in God and the church as a result of sincere religious counseling and direction requested by the counselee. Nothing could be farther from this Court's First Amendment religion clause cases, new federal law, and other state court decisions. The lower court's decision, if left to stand, will adversely impact the public interest in and access to pastoral counseling. It thus merits plenary review by this Court.

The case has raised concerns for pastoral counseling supervisors throughout the country. The lower court did not understand that pastoral counseling supervision, like diocesan supervision of parish clergy, is not equivalent in concept or practice to employment supervision. The court did not understand that "negligent supervision" as a legal conclusion rests on facts that would be expected in an employment situation, evidencing real control by the supervisor over the subordinate. Such facts are not present here and are not usually present in pastoral counseling supervision. The threat of such liability assigned to pastoral counseling supervision or diocesan supervision without the effective means to control the supervisee will have severe adverse consequences for the practice of pastoral supervision.

Supervisors in pastoral counseling centers accept the educator-mentor model, but do not, outside the administrative context, undertake detailed quality assurance monitoring of a supervisee's counseling caseload, as might be expected in an employment context. The goal of the

supervision is to enhance the professional performance of the supervisee, to evaluate the issues and problems the supervisee identifies. They will work to improve the insight of the counselor in being a representative of a faith community to the counselee and in doing the work of pastoral counseling. They have no foreknowledge of human failure and, thus, cannot predict it in their supervisees. When factors indicate, supervisors will intervene or monitor actual cases. However, they will stop supervising if they must become, as a matter of law, insurers of the supervisee's professionalism, guarantors that the supervisee will not commit a boundary violation or mishandle the transference or countertransference phenomenon.

If they use influence, but have little control in an employment-like setting over their supervisees, supervisors cannot be held to negligence standards for "hiring" their supervisees. The Colorado decision seems to imply otherwise—that testing will be a reliable predictive indicator of a supervisee's competency to handle the transference phenomenon. Common sense says otherwise. The prediction of who will be attracted to whom or for what reason is not a science.

The lower court's decision invites the conclusion that the courts would have pastoral counseling supervisors become insurers of their supervisees' misconduct when it later appears that they "should have known" not to let the supervisee continue counseling. The court takes the psychological test as predictive evidence of future misconduct. Yet, if this were true, many counselors today would be forced to abandon their profession. It is virtually impossible to predict which supervisees, if any, will violate ethical boundaries. To require such prediction, or the use of a screening test, will reduce the supervisors available to aid pastoral counselors seeking professional certification. For these reasons, the Colorado case endangers pastoral counseling supervision programs not only in Colorado, but throughout the country. Without su-

pervision, the quality assurance now represented by certification standards for pastoral counselors will not be maintained and the level of competent care now available to the public will be reduced.

If the Colorado decision stands, AAPC must decide whether and how to incorporate Colorado's rules into new practice standards, whether to revise its procedures for all supervisors, or whether to create exceptions for Colorado residents supervising uncertified members.

For the reasons stated in this Motion for Leave to File a Brief *Amicus Curiae*, amicus respectfully urges this Court to grant its motion and to grant the petition for certiorari.

Respectfully submitted,

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QUESTIONS PRESENTED

Whether Colorado's imposition of tort liability upon an Episcopal bishop, for breach of a fiduciary duty when providing ministry to a church member in the course of his diocesan work, burdens his free exercise of religion in violation of the First Amendment, the Religious Freedom Restoration Act, and *Employment Division v. Smith*, 494 U.S. 872 (1990).

Whether Colorado, in finding negligence liability against an Episcopal diocese based on duties arising under legal relationships foreign to Episcopal Church polity and practice, infringed the diocese's First Amendment rights, namely, its free exercise of religion, and impermissibly encroached upon church autonomy in contravention of the Establishment Clause.

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IN THE

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

---

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF PASTORAL COUNSELORS IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae American Association of Pastoral Counselors ("AAPC") is a membership organization that certifies individuals and accredits institutions for the practice and teaching of pastoral counseling. Generally, pastoral counselors seek to integrate insights of pastoral theology with the behavioral sciences in the treatment and care of persons with spiritual and emotional needs. AAPC supports the development of pastoral counseling as a professional vocation and specialized ministry within the mental health care field. Pastoral counselors or

pastoral psychotherapists usually see clients in clinical or professional office settings. They are compensated by clients according to fee agreements, encouraged to maintain clinical records, and make appropriate referrals to physicians and psychiatrists or other mental health care providers. Pastoral counselors may, depending on their ecclesiastical tradition, hear confessions and/or grant absolution, but all will communicate pastorally, providing spiritual counsel respectful of and responsive to the counselee's religious understanding.

AAPC's professional staff, including Executive Director, Rev. C. Roy Woodruff, Ph.D., Deputy Executive Director, Rev. Reginald Burgess, Ph.D., and its officers, including President, Rev. Jean Dalby Clift, Ph.D., J.D., of Denver, Colorado, assist in developing AAPC regional and national educational and training conferences. They coordinate activities of volunteer committees that oversee the certification process and monitor quality assurance of ethical concerns for approximately 3,000 members throughout the United States and Canada. Membership categories indicate the degree of specialized professional training, supervision obligations and privileges, and clinical practice competency: Diplomate (certified), Fellow (certified), member associate, pastoral affiliate, and pastoral counselor in training. All members are ordained (or have its equivalency) and endorsed by their faith group for the ministry of pastoral counseling. The faith groups include Roman Catholic, Orthodox, Protestant, and Jewish. Members provide millions of hours of empathetic counsel to distressed people each year in parish, synagogue and clinical settings, thereby supporting other clergy with limited time or resources to devote to those in need of counseling ministry.

AAPC's certification of individuals and accreditation of institutions assures the public that the pastoral counselor member has met prerequisite competency standards through education and training. AAPC requires all pas-

toral counselor members to adhere to its Code of Ethics to safeguard distressed persons seeking their services. The Code defines boundaries, describes duties toward clients, former clients, and supervisees, and proscribes, among other things, sexual harassment or misconduct, dual relationships, and breach of confidentiality. It describes adjudicative procedures when an ethical breach is alleged, including the appointment of a board of review, and the investigatory, review and appellate processes. A finding of an ethics code violation will result in a member's dismissal, suspension, placement on probation with conditions, or reprimand. AAPC also supports public accountability of counselors and encourages members to seek state licensure as professional counselors or marriage and family counselors as appropriate.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED TO PROTECT FIRST AMENDMENT CLERGY SPEECH AND FREE EXERCISE.

A wolf is hiding in this sheep's clothing. The Colorado Supreme Court baldly states that "clergy malpractice" is not actionable in Colorado, Pet. App. A, 18a, n. 13; *see Destefano v. Grabrian*, 763 P.2d 275, 285 (Colo. 1988), but sustains a judgment against an Episcopal bishop who counseled respondent parishioner after she was injured through sexual misconduct with an associate parish priest.[1] This case should be reviewed to correct the error of the lower court, namely, that the First Amendment is not implicated if courts treat clergy counseling in secular terms.[2]

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[1] This brief adopts the facts recited in the Petitioner's statement. *See* Pet., 2-6.

[2] The decision below relied upon expert testimony that described respondent's damage as a loss of "capacity to trust in God and the church" as a result of the sexual relationship with Father Robinson, and said the bishop "*aggravated the breakdown in trust.*"

The court's theory of breach of trust or breach of fiduciary duty, Pet. App. A, 11a, n. 9; 18a, n. 13, improperly provides a legal remedy for respondent's loss of faith and treats the bishop's communication with the respondent parishioner as without constitutional significance.[3] Plainly, Colorado believes it may circumvent the

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(emphasis added) Pet. App. A., at 11a, n.9. The court later said, "Once a member of the clergy accepts the parishioner's trust and accepts the role of counselor, a duty exists to act with the utmost good faith for the benefit of the parishioner." *Id.* at 21a.

The nature and purpose of the trust described by the court, however, is plainly religious. Clearly, if the trust is in God, the church, or in spiritual authority, the state, including the judiciary, may neither supervise the clergy in the exercise of their spiritual authority or vocation, nor provide judicial salvation by recognizing new causes of action to redress the loss of faith. *McClure v. Salvation Army*, 460 F.2d 553, *cert. denied*, 409 U.S. 896 (1972); *see also* Douglas Laycock and Susan E. Waelbroeck, *Academic Freedom and the Free Exercise of Religion*, 66 Tex. L. Rev. 1455, 1464 (1988) ("As long as membership is voluntary, church members need no protection from their church. They have no constitutional right to demand that the church treat them fairly. Rather, the Constitution protects both the church and individual believers from government interference.").

[3] The bishop and respondent parishioner had one counseling session, with the bishop granting respondent absolution after her confession. The bishop said she seemed to have a "sense of guilt that bordered on the pathological because she blamed herself for the relationship." Pet. App. A, at 10a.

This Court has previously recognized the concern that "a judge would not understand [a religious entity's] religious tenets and sense of mission." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987). When courts supervise clergy communications, they second guess the religious motives and purposes of the parties, and may misunderstand the relevant religious tenets that motivate parishioner to seek counsel and that clergy utilize in giving counsel. Here the court entered an impermissible thicket. by taking expert testimony that questioned, in effect, the efficacy of the religious counsel the bishop provided in response to respondent's request. *See* Pet. App. A, at 10a-11a, and n.9. To illustrate the complexity of questioning religious matters, the court should have steered around (1) the religious counseling given (avoiding

First Amendment, avoid what it admits is not legally cognizable in Colorado (namely, clergy malpractice), and give relief for loss of faith because of the "offense" given by otherwise lawful religious speech. Its "breach of trust" theory as applied to clergy communications may have "different elements," but it is still a wolf in sheep's clothing. *Id.* at 17a. *See Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988).

Many state courts have reviewed questions involving clergy conduct and not one, until this case, has supported the proposition that because clergy are authority figures, they may be liable to parishioners for their counsel based on secular expert testmony, even if the speech violated no statute regarding defamation or sexual harassment.[4] In fact, when a state court previously refused to apply negligence laws to expand tort liability to embrace so-called "clergy malpractice" and showed deference to federally protected Constitutional rights, this Court properly declined review. *Nally v. Grace Community Church of the Valley*, 763 P.2d 948 (Cal. 1988), *cert. denied*, 490 U.S. 1007 (1989).

Unlike *Nally*, Colorado now reaches for the opposite result and in so doing runs aground on the religion

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the necessity to probe the efficacy of the service of forgiveness in the Book of Common Prayer, 447-452, which includes the participation of the penitent *in the asking for counsel and direction*, and in forgiving those who have sinned against them), and (2) the service not rendered, including any consequent harm to respondent had the bishop failed to provide her the service of forgiveness or to regard, as his pastoral concern, the effect of her preoccupation with her injury upon her emotional state or reputation. If respondent had no legally cognizable claim against him for the latter, *a fortiori*, the former cannot give rise to a claim without offending the First Amendment.

[4] See the case law survey of state court decisions resolving clergy malpractice issues in Constance Frisby Fain, *Clergy Malpractice: Liability for Negligent Counseling and Sexual Misconduct*, 12 Miss. C. L. Rev. 97, 104-118 (1991).

clauses of the First Amendment. Colorado has effectively ignored this Court's First Amendment jurisprudence which sets important church-state boundaries for courts to follow, prohibiting all government regulation of religious beliefs, *Sherbert v. Verner,* 374 U.S. 398, 402 (1963), and barring courts from taking sides in the exercise of religious authority, *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 708-725 (1976); *Presbyterian Church v. Hull Church,* 393 U.S. 440, 445-452 (1969); *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 95-119 (1952). These and other cases were cited with approval in *Employment Division v. Smith,* 494 U.S. 872 (1990), because the government's role in those cases implicated religious authority and beliefs. Similar issues are at stake here if the bishop or clergy cannot communicate pastorally with a parishioner without fear of judicial supervision of the content of the communication.

This case should be reviewed because the lower court's decision departs from the consensus of decisional law throughout the country and provides an appropriate opportunity to address new federal legislation, applicable, on a retroactive basis, wherever religious exercise is substantially burdened without a compelling state interest. *See* Religious Freedom Restoration Act, Pub. L. No. 103-141, § 3, 107 Stat. 1488 (1993) ("RFRA").[5] Colorado, without showing a compelling state interest not satisfied by less restrictive means or any specific statutory authority therefor, claims for all clergy counselors a higher, new "fiduciary" standard that will be used in clergy counseling cases, even where there is no mis-

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[5] Congress, by RFRA, and this Court, in *Smith, supra,* would each use the compelling state interest test when both religious belief and speech are substantially burdened by government under the First Amendment. Here, the state actor is the unrestrained judiciary, making decisional law under which both religious belief and speech of clergy will be supervised.

conduct.[6] The results are predictable and will have a "chilling effect" on the free exercise of religion by clergy counselors and supervisors of pastoral counselors. The decision below signals that pastoral counselors will be exposed to legal liability when counseling difficult clients, *e.g.*, persons who suffer from depression or multiple personality disorder, whether or not such persons are concurrently being seen by a psychiatrist. Clergy, currently and properly held to the same standard of ordinary care as other reasonable persons, now worry about such things as adequate intervention with persons having suicidal ideation and when and how to make timely and appropriate referrals in borderline cases. To add to these concerns the potential aggravation of a client's loss of faith (here described as "trust in God and the church," Pet.

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[6] The lower court presumed to tell clergy how to discharge their "fiduciary" (religious) duty, *i.e.*, once they undertake the responsibility to counsel someone, it must be " 'solely for the benefit' of the dependent party, *Destefano*, 763 P.2d at 284." Pet. App. A, 21a. It did not suggest the bishop as counselor was guilty of misconduct, but still applied the standard to him. It failed to note the widespread practice of marital and family counseling, as well as the psychotherapy utilized by pastoral counselors "aimed at specific social, ethnic, or gender groupings." *See* R. Hunter, ed., "Psychotherapy," *Dictionary of Pastoral Care and Counseling* (1990) at 1022, 1026 ("Hunter"); Hunter, "Group Counseling and Psychotherapy," at 478-481. These counseling methods utilize group insights and frequently subordinate the individual counselee to collective insight or interests.

Further, the decision stated "Once a member of the clergy accepts the parishioner's trust and accepts the role of counselor, a duty exists to act with the utmost good faith for the benefit of the parishioner. *See Destefano*, 763 P.2d at 284." Pet. App. A, at 21a. The court's standard may be understood in a religious context, but it is difficult to know what "trust" means as a legal duty without further explanation. *See* Hunter, "Trust in Pastoral Relationship," at 1288 (describing trust in theological perspective, trust and conflict, trust as commitment). Taken literally, the court shoulders the burden of clergy supervision and seems to give a legal remedy whenever clergy has not skillfully responded to a parishioner's "hurts and needs when appropriate." *Id.* at 1288.

App. A, at 11a n.9) is a burden no court should be permitted to place upon clergy. A counselee's loss of faith simply cannot be reached by any tort standard. Without the protection of the First Amendment against the claim of "breach of trust" entertained here by Colorado, clergy will have no recourse but to restrict their counseling and/or supervisory responsibilities to "safer" clients.[7] The public interest that is served by the millions of hours of counseling that occur each year will be irreparably damaged.

II. THE PETITION SHOULD BE GRANTED BECAUSE FIRST AMENDMENT RIGHTS SHOULD OUTWEIGH RISK MANAGEMENT CONCERNS ASSOCIATED WITH SUPERVISION.

The concern that the lower court's decision violated church autonomy protected by the First Amendment by reaching negligence liability through duties arising under legal relationships foreign to Episcopal Church polity and practice will likely be addressed by others and need not be repeated here. But pastoral counseling is a specialized type of pastoral care, usually provided by ordained clergy, available to people willing to seek pastoral help in order to deal with the pain in their lives.[8]

Pastoral counseling is a specialized field with standards and processes for certification of individuals and accreditation of institutions for the practice and teaching of pastoral counseling.[9] Clinical institutions dedicated to pastoral care, accredited by AAPC, are called "counseling centers" and employ pastoral counselors to provide

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[7] The First Amendment was placed in issue by the court below as within its discretion, thereby opening the way for review by this Court. *See* Pet. App. A, 13a.

[8] *See* Hunter, "Pastoral Counseling," at 849; H. Clinebell, *Basic Types of Pastoral Care & Counseling: Resources for the Ministry of Healing & Growth* (1984).

[9] *See* Hunter, "American Association of Pastoral Counselors (AAPC)," at 24.

counseling services to individuals in need, as well as administrative supervision for the counselors. While many centers provide supervised opportunities for training seminarians and clergy as pastoral counselors, clinical supervision, like consultation, may be done by qualified persons not employed by the center.[10] Supervision is thus a multidimensioned phenomenon. In clinical practice, supervision often focuses on issues identified by the counselor. It is clear that pastoral supervision, other than in an administrative context, does not usually correspond to supervision of an employee with its attendant risk management concerns, but is primarily a means of education, often related to psychotherapy, that is intended to further the counselor's insight involving personal resources and practice issues. It can be, but is not necessarily, focused on the client.[11]

The court below shows no awareness of the practice of pastoral supervision and treats this subject woodenly as though counselees are intended third party beneficiaries of their counselor's supervision, when they generally are not. Therein lies the concern of this *amicus*. The danger of the lower court's decision, a truly frightening prospect,

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[10] *See* Hunter, "Pastoral Supervision," 1239-1243 (identifying seven models of pastoral supervision: work evaluation, instructor, apprentice, training, resource, consultative, spiritual guide). Pastoral supervision was developed as a distinct discipline of pastoral care education. Pastoral supervisors are today certified by the Association for Clinical Pastoral Education and give particular attention to the seminarian's psychological development and practice skills. In the counseling center, however, the "student" is likely to be a pastoral counselor in training, an ordained clergy, who is actively counseling clients, but within specific limitations under the oversight of a mentor supervisor. Within the AAPC, the membership level of diplomate indicates the highest level of qualification of pastoral counselor, skilled as a practitioner and as a supervisor-teacher of other pastoral counselors.

[11] *See* J. Bernard and R. Goodyear, *Fundamentals of Clinical Supervision* (1992).

is that pastoral supervisors should be perceived as something they are not, namely, administrative supervisors, instead of as educator-mentors. Educating pastoral counselors does indirectly and beneficially serve the client-counselee, but this should not create legal duties associated with employer-supervisors.

Petitioner has asked that the lower court decision, issued on November 15, 1993, be vacated and that the case be remanded for reconsideration in light of the new federal Religious Freedom Restoration Act, enacted into law on November 16, 1993. This is a reasonable request. However, granting the petition and issuing the writ of certiorari now would serve judicial economy and the public interest. Review will limit the "chilling effect" the Colorado decision will have on clergy supervisors of pastoral counselors and can dispel the uncertainty regarding the relationship of clergy and pastoral counselors, who devote millions of hours annually in counseling distressed persons, to clinical (not administrative) supervisors.

Amicus believes the decision below is clearly erroneous and in conflict with this Court's First Amendment religion clause jurisprudence, the new federal law, and many other state court decisions. It ignores constitutional deference to religious autonomy and regulates religious beliefs, for clergy counselors may no longer exercise their ministry in Colorado without governmental regulation of their exclusive fiduciary duties of loyalty and what they can or cannot say, even if contrary to their beliefs. The instant case can resolve these important questions. Accordingly, this *amicus* urges this Court to grant the petition for a writ of certiorari, at which time *amicus* wishes to present further briefing going to the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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1993

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Respondent.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Amici respectfully request leave to file the attached brief in support of the petition for a writ of certiorari to the Colorado Supreme Court as allowed under Rule 37 of the rules of this Court.[1]

1. This motion is submitted by a coalition of Colorado churches and religious organizations which ministers to over one million Coloradans, and by the Rocky Mountain Family Legal Foundation, Inc.

The coalition of Colorado churches and religious organizations include the Colorado Catholic Conference, the Colorado Council of Churches, the Colorado Springs Association of Evangelicals, and the Rocky Mountain Presbytery of the Presbyterian Church in America (collectively, the "Churches of Colorado").

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[1] The petitioners have consented to the filing of this brief. The respondent has not.

The Colorado Catholic Conference is the united voice of the three Roman Catholic dioceses of Colorado: the Archdiocese of Denver, the Diocese of Pueblo, and the Diocese of Colorado Springs. It represents 303 parishes and missions, 485,555 Catholics, and 14,000 students in fifty-one schools.

The Colorado Council of Churches consists of thirteen Christian churches, including the African Methodist Episcopal Churches of Colorado, the American Baptist Churches of the Rocky Mountains, the Christian Church (Disciples of Christ) of the Central Rocky Mountain Region, the Christian Methodist Episcopal Churches of Colorado, the Church of the Brethren Western Plains District, the Episcopal Church Diocese of Colorado, the Evangelical Church in the America Rocky Mountain Synod, the National Baptist Convention U.S.A. Western States Convention, the Greek Orthodox Diocese of Denver, the Presbyterian Church USA including the Presbyteries of Boulder, Denver, Pueblo, and Western Colorado, the Roman Catholic Archdiocese of Denver, the United Church of Christ Rocky Mountain Conference, and the United Methodist Church Rocky Mountain Conference. The Colorado Council of Churches represents approximately 850,000 Christians in every region of Colorado.

The Colorado Springs Association of Evangelicals is an affiliate of the National Association of Evangelicals. It is comprised of pastors and religious leaders from approximately fifty churches and fifteen para-church organizations with a combined following of nearly 15,000 individuals.

The Rocky Mountain Presbytery of the Presbyterian Church in America consists of eleven Colorado and Wyoming congregations with 4,000 individual members.

The Rocky Mountain Family Legal Foundation, Inc. is a non-profit religious freedom advocacy group serving individuals and churches throughout Colorado.

2. The issues presented by the decision of the Colorado Supreme Court involve fundamental questions regarding the boundaries between church and state—specifically:

a. Whether the courts may prescribe the content of pastoral counseling speech,

b. Whether the courts may proscribe the administration of sacramental confession in certain circumstances,

c. Whether the courts may dictate the identity of ministers selected or retained by a church,

d. Whether the courts may define ecclesial agency relationships contrary to the doctrine and canons of the church, and

e. Whether the courts may prescribe the character of church supervision of ministers.

3. *Amici* have a direct stake in this proceeding because the decision below unlawfully restricts pastoral speech and regulates matters exclusively of ecclesiastical cognizance.

4. *Amici* support the petition for certiorari and its request for consideration of the applicability of the Religious Freedom Restoration Act. They also contend that this Court should consider the right of church autonomy, the significance of the constitutional bar to clergy malpractice claims, and the limited scope of the neutral principles of law approach.

5. *Amici* are inadequately represented by any other party with regard to these issues.

WHEREFORE, *amici* respectfully request leave to file this brief.

Respectfully submitted,

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April 30, 1994

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1578

THE DIOCESE OF COLORADO, A COLORADO CORPORATION, AND BISHOP WILLIAM FREY,

Petitioners,

v.

MARY E. MOSES n/k/a MARY ELAINE TENANTRY,

Respondent.

BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS' APPLICATION FOR CERTIORARI AND IN SUPPORT OF REVERSING THE DECISION OF THE SUPREME COURT OF COLORADO

INTERESTS OF *AMICI*

The interests of the *amici* are detailed in the motion accompanying this brief.

Notwithstanding the theological, social, and political differences between them, these *amici* organizations stand together to ask this Court to grant a writ of certiorari and reverse the Colorado Supreme Court.

SUMMARY OF ARGUMENT

The Colorado Supreme Court has taken control of the Episcopal Diocese of Colorado and its bishop by applying its secular principles to:

Dictate the content of pastoral counseling speech,

Proscribe the administration of sacramental confession,

Dictate the identity of ministers selected or retained by a church,

Define ecclesial agency relationships contrary to the doctrine and canons of a church, and

Prescribe the character of church supervision of ministers.

This unprecedented judicial usurpation of ecclesial authority not only reshapes church doctrines, it also manages pastoral utterances and rules church-clergy relationships. This decision attempts to remake the church in the image of the court's secular biases. It will inevitably diminish the availability of pastoral counseling to those in greatest need and encourage ongoing judicial entanglement in ecclesiastical affairs.

The Colorado Supreme Court's recognition of claims of negligent management by a bishop of his priest and of a bishop's breach of fiduciary duty for hearing a parishioner's confession and for failing to tell her that she had no fault are, essentially, recognition of claims of clergy or episcopal malpractice which have been rejected by the California Supreme Court, the Utah Court of Appeals, the United States District Court for the Southern District of New York, and even the Colorado Supreme Court.

The *Moses* court's management of clergy-church relationships is contrary to the many decisions of this Court and the U.S. Courts of Appeals which recognize a right of church autonomy that, absent fraud or collusion, courts may not invade. *Moses* also ignores the boundaries established by this Court in the application of the neutral principles of law approach.

ARGUMENT

The Colorado Supreme Court has assumed ecclesiastical competence and authority over the Episcopal Diocese of Colorado and its bishop. It has granted the bishop and his diocese both more and less authority over the hiring and ordination of priests than that provided under denominational doctrine. It has microscopically prescribed the lawful content of pastoral counseling. These unprecedented judicial usurpations of ecclesiastical authority violate not only the Religious Freedom Restoration Act but also the right of church autonomy arising from the Religion Clauses of the First Amendment.

By affirming a $1.2 million verdict, the court below purports to grant the petitioners more authority than they have under the Episcopal doctrine of congregational calling by making them employers of a priest who is not their employee. *Moses v. Diocese of Colorado,* 863 P.2d 310, 331-37 (Colo. 1993) (Rovira, C.J., dissenting). Bishop Frey testified that because Episcopal parishes were in America for almost 200 years before their bishops arrived, Episcopal bishops have "titular authority, sort of a ceremonial authority, but very little real authority or power." Tr. at 64. He testified that Father Robinson, the alleged perpetrator of counseling misconduct, was an employee of a separately incorporated parish and not of the Diocese. Tr. at 62. He testified that he, as bishop, had no authority to hire or fire parish priests, tr. at 63 and 64, or even to veto their engagement by a parish. Tr. at 68-69. Father Robinson was, moreover, only an associate pastor who under Canon 14(a) of the Episcopal Church was "selected by . . . and under the authority and direction of the [parish] Rector." *Moses,* 863 P.2d at 332 (1993) (Rovira, C.J., dissenting). Episcopal ecclesiology empowers congregations, not bishops, to call ministers. *Articles of Religion,* art. XXIII in *The Book of Common Prayer* at 872 (1979). The Colorado Supreme Court has reversed this rule.

The court below purports to grant petitioners less authority than their doctrine provides by finding it unlawful for the bishop to ordain a priest who has any history of "sexual identification ambiguity," "depression," or "low self-esteem." *Moses,* 863 P.2d

at 328. The first condition, presumably a tendency toward homosexuality, *but see id.* at n.23, should, it would seem, render a counselor of women more safe, rather than vice versa. A history of some depression and low self-esteem, if applied as a disqualifier, would deplete the ranks of all counselors and depreciate Christian notions of forgiveness and redemption.[1] In addition, the court below overlooked Bishop Frey's testimony that the church psychologist had given Father Robinson the highest approval rating for ministry. Tr. at 98. No court should supplant theological criteria for ordination with its own.

In the Anglican tradition of which the Episcopal Church is a part, the roles and duties of bishop and priest are largely defined by rituals prescribed by *The Book of Common Prayer.* During the ordination rite, a bishop does not inquire as to a candidate's possible depression and low self-esteem, but as to whether the candidate has "been selected in accordance with the canons of this Church?" and whether the candidate's "manner of life [is] suitable to the exercise of this ministry?" *The Book of Common Prayer* at 526. A candidate neither can nor does promise psychological perfection. He vows, rather, loyalty to Church doctrine, discipline, and worship.

> [He] declare[s] that [he does] believe the Holy Scriptures of the Old and New Testaments to be the Word of God, and to contain all things necessary to salvation; and [that he will] engage to conform to the doctrine, discipline, and worship of The Episcopal Church.

Id. In keeping with the theology of congregational election, the bishop then asks the congregation whether it desires the bishop to ordain the candidate. *Id.* at 527.

The court below also attempts to prescribe the precise content of pastoral counseling by finding that Bishop Frey breached

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[1] Such criteria, applied in earlier times, would have disqualified Moses from leading the exodus, Exodus 4:10-13 (low self-esteem), Saul from serving as King of Israel, I Samuel 19:9 (depression), and Elijah from serving as prophet. I Kings 19:4 (suicidal).

his fiduciary duty which purportedly arose from his sole encounter with Ms. Moses. When Ms. Moses reported that she was the victim of pastoral counseling misconduct by a priest, Bishop Frey saw that she was burdened by inordinate guilt. When she requested sacramental confession, Bishop Frey complied. Tr. at 117-22. The court below found confession unlawful in this context. It apparently held that, by absolving Ms. Moses, Bishop Frey failed to help her understand "that she was not the only person responsible for" the inappropriate relationship with her priest. *Moses,* 863 P.2d at 323. The court also faulted Bishop Frey for failing to recommend secular counseling and for suggesting that Ms. Moses should treat the matter confidentially. *Id.* These rulings, whether taken separately or as a whole, are highly entangling. They violate church autonomy.

I. THIS CASE IS WORTHY OF THE COURT'S CONSIDERATION BECAUSE IT ALLOWS COURTS TO SELECT MINISTERS, TO DEFINE RELATIONSHIPS BETWEEN DIOCESE, PARISH, AND PRIEST, AND TO SHAPE THE THEOLOGY OF A BISHOP'S SHEPHERDING DUTY TO HIS PARISHIONER AND HIS PRIEST. IT THEREBY DISCOURAGES MINISTRY TO THOSE IN NEED, VIOLATES CHURCH AUTONOMY, AND FORMS RELIGION AS IT WILL EXIST IN THE FUTURE.

The history of the Christian Church has involved hundreds of theological disputes framed by ministerial antagonists. The Church's choice between antagonists is often a choice of one theology over another. When the Church sided with Paul over James, it welcomed Gentiles into the fold. When it sided with Athanasius over Arius, it recognized the Trinity of God. When it found for Augustine over the Donatists, it enshrined forgiveness. When the Church of England chose Cranmer over Wolsey, it chose a course independent of and often theologically distinct from Rome. The right of church autonomy means that, absent fraud or collusion, the state cannot dictate such choices. *Watson v. Jones,* 80 U.S. (13 Wall.) 679 (1871). *See* paragraph II(B) *infra.*

Just as the state cannot dictate the identity of the preacher, it cannot dictate the content of pastoral speech. When Bishop Frey chose to absolve a woman requesting confession, he chose to act upon his church's belief that confession is the remedy for guilt even when the penitent is not as guilty as she may think. Tr. at 118. This decision was informed by a theology over which the Colorado Supreme Court should claim no competence.

It is also important for this Court to reverse *Moses* because it profoundly chills churches' willingness to minister, listen to, and counsel those who are the most broken and the most vulnerable. Ms. Moses had a history of injury which long preceded her encounter with Father Robinson.[2] She and individuals like her are those in greatest need of counseling. Pastoral counselors gratuitously enhance the mental and spiritual health for millions of Americans. After *Moses,* pastoral counselors will be less inclined to counsel those parishioners with the greatest need or even hear their confessions because of the unavoidable legal risks. Judicially regulating the content of this counseling and imposing a duty to refer the parishioner to secular counselors will "stifle" such assistance. *Nally v. Grace Community Church of the Valley,* 47 Cal. 3d 278, 763 P.2d 948, 969 (1988).

Moses likewise discourages church leaders from meeting with alleged victims of misconduct because such meetings risk imposing a civil fiduciary duty that is stripped of any constitutional protection.

Moses will also spawn more claims asking civil courts to supervise church-minister relationships. This will inevitably lead to "considerable ongoing government entanglement in religious affairs" which this Court has condemned. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day*

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[2] Ms. Moses and her sister "were sexually abused by their father when they were children[, and] developed a multiple personality disorder as protection against" that abuse. Before she "entered grade school, she had developed several separate identities." Before she ever met Father Robinson, she was hospitalized for her mental illness; she attempted suicide; and the state supervised her visits with her own children. *Moses,* 863 P.2d at 315.

Saints v. Amos, 483 U.S. 327, 343 (1987) (Brennan, J., concurring). This entanglement, reinforced by verdicts like the one here, will result in a state-imposed theology and ecclesiology. "When the state interferes with the autonomy of a church, and particularly when it interferes with the allocation of authority and influence within a church, it interferes with the very process of forming the religion as it will exist in the future." D. Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,* 81 Colum. L. Rev. 1373, 1391 (1981).

II. THE *MOSES* HOLDING CONFLICTS WITH THE DECISIONS OF THIS COURT, U.S. COURTS OF APPEALS, STATE COURTS OF LAST RESORT, AND THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993.

A. The Claims Of Breach Of Fiduciary Duty, Negligent Hiring, And Negligent Supervision, As Applied Here, Are Analytically Indistinguishable From The Claim Of Clergy Malpractice Which Courts Everywhere Have Rejected.

The Episcopal Church teaches that its bishops are pastoral shepherds of parishioners and priests. During ordination, an Episcopal bishop vows "to be in all things a faithful pastor and wholesome example for the entire flock of Christ." *The Book of Common Prayer* at 517. For Episcopalians, a bishop is an icon of Christ, "the Shepherd and Bishop of our souls." *Id.* at 518. The new bishop covenants, as "chief priest and pastor[, to] encourage and support all baptized people in their gifts and ministries [and to] nourish them from the riches of God's grace." *Id.* The bishop ministers to all the faithful, including the priests of his diocese. During ordination, a bishop promises to "sustain [his] fellow presbyters and take counsel with them." *Id.* The new bishop is consecrated to "feed and tend the flock of Christ." *Id.* at 521. The symbol of his office is the shepherd's staff.

Thus, when an Episcopal bishop sees a parishioner with issues and needs like those of Ms. Moses or when he ordains,

counsels, or disciplines a priest, he does so in his role as pastor or shepherd of his people. His decisions, actions, and statements in these contexts, whether denominated by the civil courts as clergy malpractice, breach of fiduciary duty, or negligent hiring, supervision, or retention,[3] are the professional decisions, actions, and statements of a pastor shepherding his flock. Every court that has considered the constitutionality of a clergy malpractice claim has found the claim barred by the Religion Clauses of the First Amendment.[4] *Nally,* 47 Cal.3d 278, 763 P.2d 948 (Cal. 1988); *Destefano v. Grabrian,* 763 P.2d 275 (Colo. 1988); *see White v. Blackburn,* 787 P.2d 1315 (Utah Ct. App. 1990); *Schmidt v. Bishop,* 779 F. Supp. 321, 324, 327-28 (S.D.N.Y. 1991) (judicial definition of a standard of care for a clergyman unconstitutionally entangles the state with religion).

B. The *Moses* Court's Willingness To Supervise The Church-Minister Relationship Is Contrary To The Many Church Autonomy Decisions Of This Court And The U.S. Courts Of Appeals.

The Colorado Supreme Court's willingness to find negligent ordination based upon a report of depression and low self-esteem is contrary to the right of church autonomy which, absent fraud or collusion, bars judicial supervision of church-minister relationships. This right has been repeatedly recognized in the intra-church property and clergy selection disputes, *Watson v.*

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[3] However denominated, the claims of pastoral counseling malpractice, clergy malpractice, breach of fiduciary duty, and negligent hiring, supervision, or management require courts to deeply entangle themselves in theological and ecclesiological affairs by defining how a reasonable minister or bishop or pastoral counselor should minister. "[I]n analyzing and defining the scope of a fiduciary duty owed persons by their clergy, the Court would be confronted by the same constitutional difficulties encountered in articulating the generalized standard of care for a clergyman required by the law of negligence." *Schmidt v. Bishop,* 779 F. Supp. 321, 326 (S.D.N.Y. 1991).

[4] *See also* cases which reject claims of clergy malpractice on non-constitutional grounds. *Handley v. Richards,* 518 So.2d 682 (Ala. 1987); *Strock v. Pressnell,* 38 Ohio St.3d 207, 527 N.E.2d 1235 (Ohio 1988) (claim barred by heart balm statute); *Byrd v. Faber,* 565 N.E.2d 584 (Ohio 1991).

Jones, 80 U.S. (13 Wall.) 679 (1871); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America,* 344 U.S. 94 (1952); *Kreshik v. St. Nicholas Cathedral of the Russian Orthodox Church of North America,* 363 U.S. 190 (1960); *Presbyterian Church of the United States v. Hull Memorial Presbyterian Church,* 393 U.S. 440 (1969); *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich,* 426 U.S. 696 (1976); *Jones v. Wolf,* 443 U.S. 595 (1979); in a testamentary chaplaincy dispute, *Gonzales v. Roman Catholic Archbishop of Manila,* 280 U.S. 1 (1929), in various civil rights disputes, *McClure v. The Salvation Army,* 460 F.2d 553 (5th Cir. 1972) *cert. denied* 409 U.S. 896 (1972) (Title VII); *Minker v. Baltimore Annual Conf. of the United Methodist Church,* 894 F.2d 1354 (D.C. Cir. 1990) (Age Discrimination in Employment Act); in National Labor Relations Act claims, *National Labor Relations Bd. v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979); in wrongful discharge controversies, *Natal v. Christian and Missionary Alliance,* 878 F.2d 1575 (1st Cir. 1989); in disagreements regarding canonical due process, *Kaufmann v. Sheehan,* 707 F.2d 355 (8th Cir. 1983); and in termination disputes attendant with claims of defamation, intentional infliction of emotional distress, and breach of contract. *Hutchison v. Thomas,* 789 F.2d 392 (6th Cir. 1986) *cert. denied* 479 U.S. 885 (1986).

These decisions and their many progeny constitute a river of precedent recognizing the freedom and autonomy of the church from entanglement by the state. This river runs wide and deep, but it nowhere runs wider or deeper than when the defendant church is hierarchical and the plaintiff is asking the state to supervise the church's relationship with its own clergy. Absent a showing of fraud or collusion, the First Amendment does not allow it.

C. The *Moses* Court's Application Of The "Neutral Principles Of Law" Approach Far Exceeds The Defined Limits Of That Approach.

The court below holds that it can determine whether the content of a bishop's counsel constitutes a breach of fiduciary duty and whether a bishop's ordination and supervision of his priest is negligent by resorting solely to neutral principles of law.

No court has ever extended the neutral principles approach so far. This Court limited the neutral principles approach to instances in which a court can rely "exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges." *Jones v. Wolf,* 443 U.S. 595, 603 (1979). This Court also forbids application of the neutral principles approach to determine the locus of control within a church which, for the Diocese of Colorado, was so cavalierly reshaped by the Colorado Supreme Court. *Id.* at 605. *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.,* 396 U.S. 367, 369-70 (1970) (Brennan, J., concurring). In addition, Maryland's highest court rejects any application of the neutral principles approach which would, as here, be tantamount to judicial selection of clergy. *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.,* 254 A.2d 162, 170 (Md. 1969).

> We do not understand that the decision in *Hull* requires the State equity courts to provide effective discipline and control of a denomination over its clergy or to maintain that denomination's "purity of doctrine." As we see it, this would be "establishment of religion" with a vengeance, and under . . . the prohibitions of the First Amendment [we are not] permitted to do this.

Id.

D. Judicial Supervision Of Pastoral Speech Through Imposition Of A Fiduciary Duty Is Barred By The Free Exercise Clause.

The willingness of the court below to dictate the content of pastoral counseling is contrary to other precedents. *Nally,* 47 Cal.3d 278, 253 Cal. Rptr. 97, 763 P.2d 948 (Cal. 1988); *Guinn v. Church of Christ of Collinsville,* 775 P.2d 766, 774 (Okla. 1989). *See* pp. 4-5, *supra.*

E. If This Court Holds That The Religious Freedom Restoration Act Of 1993 Controls The Analysis Below, Then The State Has No Compelling Interest For So Severely Restricting Religious Liberty.

Legal issues arising from church-minister relationships are properly analyzed under the church autonomy cases discussed above. Thus, the *Moses* court's reliance on *Employment Div., Dept. of Human Resources v. Smith,* 494 U.S. 872 (1990) is misplaced. If, however, this Court finds that *Smith's* restriction of the compelling state interest test is a proper foundation for *Moses,* then these *amici* concur that the case should be remanded for further evidence regarding issues relevant to the application of the Religious Freedom Restoration Act of 1993. Any such remand should also allow further evidence regarding the right of church autonomy.

CONCLUSION

The Churches of Colorado and the Rocky Mountain Family Legal Foundation request that this Court issue a writ of certiorari and reverse the decision below.

Respectfully submitted,

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April 30, 1994

MOTION FILED

MAY 4 1994

(4)

No. 93-1578

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE DIOCESE OF COLORADO, A COLORADO CORPORATION, AND BISHOP WILLIAM FREY,

Petitioners,

v.

MARY E. MOSES n/k/a MARY ELAINE TENANTRY,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Colorado

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF BEAR VALLEY CHURCH OF CHRIST AND THE ROCKY MOUNTAIN CONFERENCE OF THE UNITED METHODIST CHURCH IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1578

THE DIOCESE OF COLORADO, A COLORADO CORPORATION, AND BISHOP WILLIAM FREY,

Petitioners,

v.

MARY E. MOSES n/k/a MARY ELAINE TENANTRY,

Respondent.

Petition for a Writ of Certiorari to the
Supreme Court of Colorado

MOTION OF THE BEAR VALLEY CHURCH OF CHRIST AND THE ROCKY MOUNTAIN CONFERENCE OF THE UNITED METHODIST CHURCH FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* RESPECTING PETITION FOR CERTIORARI

Movants are non-profit religious organizations in the State of Colorado.

The written consent of the Petitioners, the Diocese of Colorado, a Colorado corporation, and Bishop William Frey, has been obtained and filed with the clerk of this Court. The consent of the Respondent has been requested and refused.

Movants seek to submit a brief *amicus curiae* because they share with Petitioners a vital interest in the outcome of this proceeding. Both movants have cases presently under appeal in Colorado concerning the manner in which the State of Colorado has interpreted the First Amendment and its effect on religious organizations where clergy have committed sexual indiscretions or been accused of such indiscretion.

Movants requested this Court grant leave to file their combined brief *amicus curiae* to present information to this Court urging modification or reversal of the opinion of the court below.

Respectfully submitted,

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INTRODUCTION

Counsel filing this *amicus curiae* brief has been involved in many lawsuits in Colorado for almost ten years where religious institutions have had claims made against them for sexual improprieties of individuals associated with the religious institution, principally clergy.

Three recent jury trials resulting in verdicts for plaintiffs in the District Court for the City and County of Denver, State of Colorado, are now in various stages of appeal with the avowed intent of ultimately petitioning this Court for a writ of certiorari based on the First Amendment. The same Trial Counsel for the Respondent in the case now before this Court was also the trial counsel for the following three cases.

A brief summary of these three cases are set forth below which exhibit the pervasive manner the Colorado Courts are now ignoring the First Amendment's proper application to religious organizations:

BEAR VALLEY CHURCH OF CHRIST[1]

This case is pending an opinion by the Colorado Court of Appeals as oral argument was held on January 31, 1994.

Denise DeBose and her minor son brought suit against Bear Valley Church of Christ and a minister, Homer Wolfe, alleging improper conduct during the counseling of the son. After two weeks of trial and five days of deliberation, on July 31, 1992, the jury returned verdicts for Denise DeBose against Homer Wolfe on claims of fiduciary duty ($6,536.25) and exemplary damages ($8,855.25), for the minor for breach of fiduciary duty ($53,117.52), outrageous conduct ($23,397.00) and exemplary damages ($50,500.00). The jury returned verdicts for Denise DeBose against the Bear Valley Church of Christ for

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[1] *Denise DeBose, and J.D.B., a minor child, by and through his parent and next friend, Denise DeBose, Plaintiffs-Appellees vs. Homer Wolfe and Bear Valley Church of Christ, a Colorado corporation, Defendants-Appellants,* Court of Appeals, State of Colorado, Case No. 92 CA 001929

breach of fiduciary duty ($12,138.75) and exemplary damages ($16,444.75); and for the minor on breach of fiduciary duty ($103,110.48), negligent hiring/supervision ($84,083.52), outrageous conduct $28,764.00), exemplary damages ($80,625.00) and held the church vicariously liable for the minister's conduct. The total verdict against the minister was $135,869.77 and against the church for $313,027.75 plus vicarious liability of $83,050.77.

The Church of Christ is a denomination of autonomous churches without a hierarchy structure. The ministers are hired directly by the congregation from applicants who need neither a seminary degree nor a certification by the denomination. The ruling authority of each church are the elders, who are selected from the congregation by a vote pursuant to the requirements set forth in the New Testament, first chapter of Timothy and first chapter of Titus. They believe the Bible is the source of all conduct. Where the Bible speaks, they attempt to comply and where the Bible is silent they are silent. The elders are responsible for the members' souls.

The Bear Valley Church of Christ was started by Roy Baker and others in 1962. Homer Wolfe was hired by the elders as its third staff minister in 1981 to start the new Family Life Ministry. Wolfe was known to most of the elders before his hiring. Roy Baker had known him since 1957. He was employed for eight years as Minister of Education at the Arvada Church of Christ just prior to being hired by the Bear Valley Church of Christ.

Homer Wolfe was raised in and served as a minister for 40 years in the Church of Christ denomination. Wolfe's family had a history of involvement as ministers in the denomination since the start of the Church of Christ at the the time of Reformation. His father, two brothers, various uncles and cousins served, in recent times, as ministers in the Church of Christ.

Denise DeBose joined the Bear Valley Church of Christ in 1981 through a friend. She had four children with J.D.B., age 17 at trial time, the oldest. Her husband was a compulsive gambler which ultimately led to a breakup of the marriage in November

of 1987 and a divorce in January 1989. In the process the family underwent bankruptcy and foreclosure on their house in 1985. She sought counseling with Homer Wolfe in 1984, which she found satisfactory. She then switched her counseling to Randy Sims from 1985 to 1989. Her son, J.D.B., counselled with Wolfe starting in 1985. J.D.B. testified Wolfe had him sit on his lap and would rub his back and legs, sometimes underneath his shorts and sliding his shirt up. He had no memory of seeing Wolfe in 1987 or in 1988, although Wolfe's records indicated he may have seen J.D.B. He stated in his deposition Wolfe rubbed his thigh only once. At trial he alleged one inadvertent touching of his penis, although at the time of his deposition he denied any touching of the penis.

In June or July of 1987 Gary Don Wygal, Sr., who was a student minister at the church's school of preaching, and his wife, Mary, came to the elders with a complaint about Wolfe's counseling visits with their son, Gary Don Wygal, Jr. The substance of the complaint was an objection to Wolfe's alleged request to view their son's circumcision. The elders held a meeting with Wolfe on August 13, 1987 about his counseling and specified it was to be pastoral counseling and not clinical. The Wygals were not satisfied with the elders feeling there had been a misunderstanding, which led to a second meeting with the elders and Wolfe on March 20, 1988. Wygals never demanded Wolfe be fired and Gary Wygal, Jr. and Wolfe exchanged apologies alone in the parking lot two weeks after March 28, 1988, witnessed by elder Taylor.

On March 23, 1988 the elders suspended Wolfe's counseling, and discharged Wolfe over his objection in early June of 1988 due to Wolfe's failure to develop the Family Life Ministry to the elders' satisfaction.

After Denise DeBose learned of Wolfe's firing, she objected to the elders, but on June 9, 1988 Randy Sims telephoned her and said not to let J.D.B. see Wolfe as a result of Sims' conversation with Stephen Magyar, who he was by then

counseling. On about June 10, 1988 Denise DeBose heard Candice Magyar at an alcohol support group meeting state Wolfe had massaged her husband and had him strip naked in front of a mirror in counseling. Mrs. DeBose immediately hurried home and questioned her son about the counseling sessions with Wolfe. She took J.D.B. to see Randy Sims who had three or four sessions with J.D.B. and did not refer him out to anyone else. J.D.B. received no further treatment until after January 3, 1992 when his deposition was taken after he filed suit.

Stephen Magyar had counseled with Wolfe from 1985 to early June of 1988 and had talked to the elders on at least four occasions in support of Wolfe after July of 1987, including the day he was fired, without revealing his later complaints and had deliberately withheld information knowing the elders had a concern Wolfe was going beyond pastoral counseling to psychotherapy.

Homer Wolfe testified his pastoral counseling was dictated by his sincerely-held religious beliefs and was consistent with the Church of Christ's practice of religion (See Appendix A, part of Wolfe's testimony at trial regarding his pastoral counseling). He acknowledged using massage in counselling but denied he employed it with J.D.B.

The trial court permitted plaintiffs to put on the following evidence against the church:

Wolfe was hired by the church without adequate investigation; Wolfe was not qualified to counsel; Wolfe's methods were improper; Wolfe was not equipped to counsel emotional matters; Wolfe improperly touched people; Wolfe required a qualified supervisor; no one at the church was qualified to supervise Wolfe; the elders' supervision resulted in harm by Wolfe; the elders acted improperly in handling the Wygal matter; the elders did not investigate the Wygal matter properly; the elders improperly defined Wolfe's job duties; the church improperly defined the counseling service of Wolfe; the church failed to inform the congregation of Wygals' complaint; the church failed to properly

advise the congregation upon suspending Wolfe's counseling; and the church failed to properly advise the congregation upon terminating Wolfe. The plaintiffs were allowed to present "expert" witness testimony as follows:

1. Marie Fortune, Clergyperson, United Church of Christ (note: this is not the same as the Church of Christ denomination), working as Executive Director, Center for the Prevention of Sexual and Domestic Violence, Seattle, Washington, was permitted to compare Wolfe's counseling to incest and give opinions on the standard of care for elders in a Church of Christ, although never having experience within a Church of Christ, acknowledging there was no standard of care for churches and the standard she used was one she made up! She was also allowed to testify to a standard of care for pastoral counseling, although admittedly not trained as or engaged in pastoral counseling.

2. Gary R. Schoener, Clinical Psychologist, working as Executive Director, Walk-In Counseling Center, Minneapolis, Minnesota, was permitted to state sexual abuse occurred to J.D.B., and gave opinions on the standard of care for pastoral counseling, yet has never worked as a pastoral counselor. He was allowed to give opinions on the standard of care of elders in a Church of Christ without ever being associated with a Church of Christ.

3. Kathy Morall, M.D., Psychiatrist, Denver, Colorado was permitted to state sexual abuse occurred to John DeBose and give opinions on the standard of care for pastoral counseling.

Appendix B, C & D are copies of jury instructions given by the trial court on the claim of fiduciary duty and the claim of negligent hiring and supervision against the church.

ROCKY MOUNTAIN CONFERENCE OF THE UNITED METHODIST CHURCH/WINKLER[2]

This case is on appeal to the Colorado Court of Appeals. The notice of appeal was filed 4/20/94 as a result of a twelve-day trial ending on January 26, 1994.

Dianne R. Winkler brought suit against Rev. Chambers, the Church and the Conference. The Church settled out for $23,500; a jury verdict was rendered 1/26/94 against Rev. Chambers for breach of fiduciary duty for $57,350 and against the Conference for negligent hiring and supervision for $95,853 and breach of fiduciary duty for $10,651.

Mrs. Winkler started attending the Grace Church in 1988, where Rev. Chambers was senior pastor. She joined the Grace Church in October of 1988. She alleges from August 1990 to March 1992 Rev. Chambers sexually harassed her at the Grace Church on eight specific occasions and during three other periods where she has a general memory of sexual harassment. The complained of conduct consisted of unwanted hugs, "sexual hugs", kissing her cheek/hair and statements that he loved her. On one occasion she claims he put his hand between her legs, stroking her inner thigh below the shorts she was wearing while she was seated next to him on a love seat in his office. On one occasion she claims he purposely rubbed against her body as she descended a ladder, knocking her off, and as he grabbed her, he touched her left breast.

Mrs. Winkler sought out Rev. Chambers for counseling from the early spring of 1990 to the end of 1991 due to the death of her father and emotional problems with her mother.

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[2] *Dianne R. Winkler, Plaintiff, vs. Glenn Chambers, Rocky Mountain Conference of the United Methodist Church, a Colorado non-profit corporation and Grace United Methodist Church, a Colorado non-profit corporation, Defendants.* District Court, City and County of Denver, Colorado, Case No. 93 CV 378, Courtroom 2

Rev. Chambers is alleged not to have acted inappropriately during counseling, except on reflection back she believes he gave her hugs of a sexual nature at the end of some sessions.

Mrs. Winkler told only her husband early on about the claimed sexual harassment; he did nothing. In January 1992 she discussed her complaints with two other women in the Grace Church. She never complained to anyone at the Grace Church until February 29, 1992, when she told Rev. Chambers' secretary, Debbie Sampson, Rev. Harold Anderson, an associate pastor at the Grace Church and the Grace Church janitor. On the following day she went to Bob Moore, a member of the Grace Church Staff Parish Relations Committee. She did not complain to the Conference until April 9, 1992, when she was specifically asked about her complaints following a written complaint of Carol Klein to the Conference.

In March 1992, Carol Klein, a member of the Grace Church, hand delivered a written letter alleging unwanted sexual harassment by Rev. Chambers to Rev. Margaret Rush, Conference District Superintendent. Rev. Rush has administrative responsibility for the Grace Church, as one of the 51 churches in her district, and for Rev. Chambers who is one of the approximately 70 ordained ministers within her district. The written complaint, plus information of complaints by five others, resulted in the permanent removal of Rev. Chambers from the Grace Church on April 9, 1992 and he was also placed under review with the Conference Board of Ordained Ministry and Joint Review Committee, pursuant to The Book of Discipline of the United Methodist Church, which is the ecclesiastical law and procedure of the denomination. Rev. Chambers is now on disability status.

Rev. Chambers was admitted as a member of the Conference in 1965 and has been appointed to many positions in local churches and within the Conference from 1965 to April 1992. He was appointed to Grace Church on July 1, 1979.

Rev. Chambers in 1972, as a result of the breakup of his first marriage, was investigated by a committee appointed by the Bishop which resulted in no Book of Discipline charges being brought but the committee did say he was in need of psychiatric counseling. In 1980 Rev. Chambers' second wife told a bishop he was an alcoholic but no action was taken because the bishop was working closely with Rev. Chambers, who at the time was a district superintendent, and the bishop had not observed any alcohol related conduct by Rev. Chambers.

In the late 1980s two separate district superintendents received complaints of an alcohol nature and spoke to Rev. Chambers about these complaints. At the time of trial Rev. Chambers admitted to being an alcoholic and hiding his problem for years from the Conference and the Church. Rev. Chambers denied deliberately sexually harassing any women and denied any memory of most instances referred to by the complaining women.

Appendix E is the trial court's order denying the Conferences' motion for summary judgment on the First Amendment.

Appendix F is one of the trial court's jury instructions which denies the Conference may follow its adopted rules and procedures in The Book of Discipline to avoid liability.

ROCKY MOUNTAIN CONFERENCE OF THE UNITED METHODIST CHURCH/BOHRER[3]

This case will be appealed to the Colorado Court of Appeals. The motions for new trial are presently pending in the trial court following a thirteen-day trial ending on 3/26/94.

Christa G. Bohrer brought suit against former Rev. Daniel DeHart, the Church and the Conference. The jury rendered a

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[3] *Christa G. Bohrer, Plaintiff vs. Daniel DeHart, Rocky Mountain Conference of the United Methodist Church, a non-profit Colorado corporation and First United Methodist Church of Greeley, a non-profit Colorado corporation, Defendants.* Case No. 93 CV 9434, Courtroom 6

verdict against DeHart on theories of breach of fiduciary duty, outrageous conduct and negligence in the sum of $187,500 and for exemplary damages of $187,500. The verdict against the Church was for breach of fiduciary duty, negligent hiring or supervision and outrageous conduct in the sum of $37,500. The verdict against the Conference for breach of fiduciary duty and negligent hiring or supervision was $150,000 and for exemplary damages of $150,000. The verdict total amount was 50% against the minister, 40% against the Conference and 10% against the Church.

Christa G. Bohrer was active in the Greeley Church Youth Group before DeHart came as the youth minister in 1982, when he was 27. By June of 1985, when she was 14, they were engaged in a clandestine sexual affair, which continued after DeHart left the Greeley Church in the fall of 1985 to continue schooling nearby until the summer of 1988 after she graduated from high school. DeHart continued for a year as a leader in the Conference youth activities after leaving the Greeley Church and Christa Bohrer continued as a youth in the Conference youth leadership. No one at the Church or Conference, including her parents, who were active at the Greeley Church, her mother being a part-time employee and part of the leadership at Conference functions, became aware of the affair until early 1991.

As a result of Christa Bohrer's written complaint to the Conference in January of 1991, DeHart surrendered his membership credentials with the Conference in February of 1991. DeHart chose not to dispute the complaint which would have resulted in charges and a church trial, pursuant to authority in The Book of Discipline. As a result of her complaint to the police in 1992 DeHart was criminally prosecuted for sexual assault on a child. He entered a guilty plea to a misdemeanor and a felony count on 3/18/93 and was sentenced to six years probation and sex counseling on the felony and sixteen months work release in the county jail on the misdemeanor.

Christa Bohrer testified while she intended to keep the affair secret, the Church and Conference should have discovered

its existence because of conduct she stated occurred in the presence of others from the Conference and Church.

The trial court rejected the Conference's motion for summary judgment on the First Amendment (see Appendix G for trial court's order) and during jury instruction preparations and motions stated to the defendants, their efforts to invoke the First Amendment as a defense was frivolous. The trial court also gave a jury instruction identical to Appendix F.

ARGUMENT

The Supreme Court of Colorado's decisions in *Destefano v. Grabrian,* 763 P.2d 275 (Colo. 1988) and *Moses v. The Diocese of Colorado,* 863 P.2d 310 (Colo. 1993) have resulted in questioning how a religious organization may select, assign, supervise and discipline clergy, to question how a religious organization may conduct its administration, and to question in detail how a clergy may conduct pastoral counseling, all in violation of the First Amendment protections.

The imposition of liability on a religious institution for sexual indiscretions of clergy inhibits the institution's exercise of religion in violation of the free exercise clause and/or prescribes acceptable practices (or proscribes unacceptable practices) in violation of the establishment clause, even if the individual clergy's conduct places him outside the protection of the First Amendment. Subjecting a religious institution to liability based on the manner it selects, hires, supervises, disciplines or retains its clergy directly interferes with the institution's free exercise of religion. Where the focus is on the religious institution's actions in its religious context in which the acts occurred the free exercise clause is triggered and it is not a question of a neutral law of general applicability.

This brings the matter squarely into the compelling state interest test and no compelling interest is present which would justify any interference by the state in the institution's free exercise or establishment of religion.

CONCLUSION

The court is requested to issue a writ of certiorari to review the judgment of the Colorado Supreme Court in this case to prevent the courts of Colorado from continuing to ignore the required application of the First Amendment to religious organizations.

Respectfully submitted,

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Dated: May 5, 1994

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APPENDICES

APPENDIX A

HOMER WOLFE

Testimony at trial by the minister defendant, Homer Wolfe, was as follows:

"Q. While you were a minister at Bear Valley Church of Christ, did you have occasion to do some counseling with John DeBose?

A. Yes, sir, I did." (Vol. 13 at 9:3-6)

Q. Did you have a number of sessions with John Debose?

A. Yes, sir I did.

Q. Did you ever at anytime massage John DeBose?

A. No, sir. (Vol. 13 at 9:14-18)

Q. Do you sometimes, as a counselor, or has it been your practice at times in your counseling, to use massage on a counselee?

A. Occasionally, yes, sir. (Vol. 13 at 10:5-8)

Q. What would the purpose of massaging one in counseling?

A. The purpose is to increase the value and the ability to communicate, both to hear and to share. Since John could not share at all, it would have been a waste of time to spend massaging, it seemed to me at that time. (Vol. 13 at 10:14-19)

Q. Referring to the kind of counseling that you have done, Homer, are there different kinds of counseling?

A. Yes, there are.

Q. What are there, two basic types?

A. Two basic types, yes. One is generally speaking, secular counseling and the other is pastoral counseling.

Q. What is secular?

A. The word "secular" itself means the absence of God, without God; and so the secular counselor does not call upon God or pinpoint him or consult him at all. In fact, it is sort of like man pulling himself by his own bootstraps, finding the pulpit within himself and the direct contact. Jeremiah said, it is not in the way of man to get in the steps. In other words, we can't find our way in life without God. And in the pastoral counselor, where a pastor brings — the best picture is of a shepherd. It brings to mind the shepherd without whom the sheep — the sheep are helpless. They can't defend themselves. He gets them food or water. They must have someone to direct them. This is the shepherd. It's man not being able to direct his own steps, must have God's and Christ's help in finding his way out of his hurting way of life into a acceptable, happy way of life. So pastoral counseling depends upon Christ, not upon the counselor, and God.

Q. Have you ever done any secular counseling?

A. No, sir.

Q. All of your counseling has been pastoral?

A. Yes, very definitely.

Q. Is that sometimes referred to as — also as biblical counseling?

A. Yes, sir, it is.

Q. And Christian counseling?

A. Yes, sir, they're the same.

Q. Over the years when you have been called on to counsel people in pastoral counseling, have you explained each time to the counselee what can be done by them — or them in order to obtain help?

A. Yes, sir. I've always made it a point to point out basically the facts of pastoral counseling, telling them that actually I have no power to change your lives. I do not have the wisdom or the understanding of the Lord to change your lives, that — but that I could be a facilitator in order to help them get communication with God and find — (Vol. 13 at 11:8-25; Vol. 12 & 13:1-3)

Q. As a general proposition, Homer, do you have a belief as to what the basic problem is that exists for humans in their relationship with God?

A. Yes. It goes clear back to the beginning of time, beginning of our problems with sin. Adam and Eve sinned against God; immediately they were separated from him. There was not the communication there. There was not the loving and the touching and the presence together. And mankind at that point was becoming as having fallen from grace, fallen from God, fallen from righteousness. And when you say a person is separated from God, he's separated from the source of life. He's separated from the wisdom. Their lives can't be guided or changed or improved. So our basic problem is our separation from God, and we were supposed to be seeking to get back to him. The closer we get to the source of life, the happier we are. The more we commune with him, the better quality of life we're going to have.

Q. Do people hide from God as a result of the —

A. It's been happening since Adam and Eve hid from God and went behind the trees and covered themselves with fig leaves and — as Jonas tried to hide from God. The Bible is full of it. We see it all around us, yes.

Q. In your activities as a minister over a period of approximately 40 years, were you at all times trying to help people find ways to do away with that separation from God?

A. Yes. This was my entire basic goal, to get people back to God, in communication with him, living with him and for

him; and all of the counseling that I did was designed to do that. And, of course, the only ways that God speaks — letting him be responsible, let him keep his promises, learning our — helping people to learn how to open their hearts.

Q. Do you sincerely believe that — Homer, that if a person reveals his problems to God and admits that he needs help from God, he will receive help?

A. God has promised that. He has said that he will — ask and you shall receive, knock and you shall find. The ways of life and God will be revealed and will be opened and will be revealed as we ask God and are willing to change our lives, straying away from those things that are ungodly and moving forward to those things that are godly. (Vol. 13 at 41:19-25; Vol. 42 & 43:1-12)

Q. Homer, what are your beliefs about the subject of touching among human beings?

A. I believe that it is one of the best ways to communicate — of communicating your care and concern for the other person. We have been created in the image of God. God is love, and we are made in his image. Man can't function happily, none of us can, if we do not feel loved. It's one thing to tell somebody — say, I love you; it's entirely another thing to have it demonstrated in some way, and touching has always been some way of saying, I care about you, you're important, you're somebody, you have value, and that's something everybody needs. (Vol. 13 at 15:11-23)

APPENDIX B

INSTRUCTION NO. 13

In order for either plaintiff, Denise or John DeBose, to recover their claims of breach of fiduciary duty from either defendant, Homer Wolfe or Bear Valley Church of Christ, you must find all of the following have been proved:

1. The specific defendant was acting as a fiduciary of the specific plaintiff;

2. The specific defendant breached a fiduciary duty to the specific plaintiff;

3. The specific plaintiff incurred, injuries, damages or losses;

4. The specific defendant's breach of fiduciary duty was a cause of the specific plaintiff's injuries, damages or losses.

If you find that any one or more of these 4 propositions has not been proved by a preponderance of the evidence, then your verdict must be for the defendant.

On the other hand, if you find that all of these 4 propositions have been proved by a preponderance of the evidence, then your verdict must be for the plaintiff as to that claim for breach of fiduciary duty.

APPENDIX C

INSTRUCTION NO. 14

In determining whether either defendant, Homer Wolfe or Bear Valley Church of Christ was acting as a fiduciary for either plaintiff, Denise DeBose or John DeBose, with regard to care or counseling, you shall consider the following:

1. The degree of control the defendant exercised over the care or counseling;

2. The extent to which the plaintiff placed trust and confidence in the Defendant in dealing with the care or counseling; and

3. The level of expertise which the plaintiff possessed in his or her own dealings with the care or counseling.

APPENDIX D

INSTRUCTION NO. 17

In order for either plaintiff to recover from the defendant, Bear Valley Church of Christ, a Colorado corporation, on his or her claim of negligent hiring or supervision, you must find all of the following have been proved:

1. Plaintiff incurred injuries; damages or losses:

2. The defendant was negligent in its hiring or supervision of Homer Wolfe; and

3. The defendant's negligence was a cause of the plaintiff's injuries, damages or losses.

If you find that any one or more of these propositions has not been proved by a preponderance of the evidence, then your verdict must be for the defendant as to that plaintiff.

On the other hand, if you find that all of these propositions have been proved by a preponderance of the evidence, then your verdict must be for that plaintiff as against Bear Valley Church of Christ.

APPENDIX E

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 93 CV 378, Courtroom 2

DIANNE R. WINKLER, *Plaintiff,* v. GLENN CHAMBERS; ROCKY MOUNTAIN CONFERENCE OF THE UNITED METHODIST CHURCH, a Colorado non-profit corporation; and GRACE UNITED METHODIST CHURCH, a Colorado non-profit corporation, *Defendants.*	ORDER RE: DEFENDANT, ROCKY MOUNTAIN CONFERENCE OF THE UNITED METHODIST CHURCH'S, MOTION FOR SUMMARY JUDGMENT ON FIRST AMENDMENT GROUNDS

THE COURT, having considered motion for summary judgment filed by defendant, Rocky Mountain Conference of the United Methodist Church, the response, the reply, the court file and relevant authorities, and being sufficiently advised in the premises, finds, concludes and orders as follows:

1. The defendant, Rocky Mountain Conference of the United Methodist Church ("Conference"), moves for summary judgment on all of plaintiff's claims (negligent hiring, supervision and retention; breach of fiduciary duty; and outrageous conduct) on the ground that they are barred by both the free exercise and establishment clauses of the First Amendment to the United States Constitution. In essence, the conference claims that its hiring, retention and supervision of defendant, Chambers, was a religious activity rather than a secular activity and that subjecting it to civil liability for such activity violates the First Amendment. The Court disagrees.

2. One moving for summary judgment must establish that, resolving all doubts regarding the evidence in favor of the nonmoving party, there is no genuine issue of material fact and that it is entitled to summary judgment as a matter of law. See *O'Herron v. State Farm Mutual Automobile Insurance Co.*, 397 P.2d 227 (Colo. 1964).

3. A court may entertain claims against a religious organization consistent with the First Amendment where those claims call for the application of neutral state laws rather than for the resolution of disputed issues of religious doctrine and practice. *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440 (1968). For purposes of the foregoing statement, common law principles are part of the state law. See *Bishop & Diocese of Colorado v. Mote,* 716 P.2d 85 (Colo. 1986).

4. Plaintiff's claims are common law tort claims and such claims have been held actionable in Colorado against clergy and religious organizations. See *Destefano v. Grabrian,* 763 P.2d 275 (Colo. 1988).

5. The critical inquiry in testing such claims against a constitutional challenge under the First Amendment is whether resolution of those claims require the interpretation or weighing of church doctrine as opposed to the application of neutral principles of law. See *Moses v. Diocese of Colorado,* P.2d (Colo. Nov. 15, 1993). In the instant case, even accepting defendant's statement of the facts as undisputed, the Court concludes that defendant has not demonstrated as a matter of law that plaintiff's claims require the interpretation of its religious doctrine as opposed to the application of neutral principles of law. For the purposes of this conclusion the Court has accepted defendant's contention that it proceeded with its administrative responsibilities under the Book of Discipline and processed the written complaint against Rev. Chambers through the Book of Discipline procedures. Assuming that to be the case, the Court is not persuaded that plaintiff's

claims constitute a challenge to the religious beliefs or doctrines of the church. Accordingly, the motion is denied.

Dated this 7 day of January, 1994.

BY THE COURT:

JOHN N. MCMULLEN
DISTRICT COURT JUDGE

cc: All counsel.

APPENDIX F

INSTRUCTION NO. 21

Evidence that an organization did or did not follow its internal rules or policies, such as The Book of Discipline, is only one factor to be considered in determining whether the organization acted reasonably or whether it breached a duty.

APPENDIX G

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Civil Action No. 93CV434

CHRISTA G. BOHRER, *Plaintiff,* v. DANIEL DEHART, ROCKY MOUNTAIN CONFERENCE OF THE UNITED METHODIST CHURCH, AND FIRST METHODIST CHURCH OF GREELEY, *Defendants.*	ORDER

THE COURT, having reviewed numerous Motions for Summary Judgment and the Responses and the Replies thereto, makes the following findings and conclusions, and issues the following order:

I. ALLEGATIONS

1. The Amended Complaint filed in this case on February 22, 1993 alleges the following relevant facts:

A. In 1983, at the age of twelve, Plaintiff began counseling with Defendant Rev. Daniel Dehart a minister employee at the First United Methodist Church of Greeley.

B. Defendant Rocky Mountain Conference of the United Methodist Church is a Colorado corporation with its primary office in Denver, Colorado.

C. Defendant DeHart emotionally and sexually abused the Plaintiff from 1983, to May 1988. The abused occurred in a variety of locations, including sacristies of several churches. Plaintiff alleges that assorted members of the

First United Methodist Church of Greeley witnessed inappropriate behavior between Defendant DeHart and Plaintiff.

D. Defendant DeHart was the Youth Coordinator of the Greeley Peaks Sub-District where he had increased access to children, including the Plaintiff. Many times Defendant DeHart sexually abused the Plaintiff while acting in this role. The alleged abuse included fondling, sexual intercourse and emotional manipulation.

E. The Conference and the Church had a duty to prevent reasonable foreseeable harm in the hiring, supervision and training of DeHart. Defendant DeHart acted as the agent of each of the other three Defendants.

F. Agents of the Conference and the Church repeatedly witnessed inappropriate behavior from Defendant DeHart. All knew or should have known Defendant DeHart was violating boundaries and abusing the trust he sought as a minister with the Plaintiff as well as other teenagers. The policy of each organization has for decades been dealing in secret with sexual abuse and then "whitewashing" the problems. There were no clear policies to identify and stop the abuse.

G. On January 24, 1991, the Plaintiff wrote directly to the leader of the Conference, Bishop Roy Sano, with the details of her years of betrayal. Bishop Sano refused further inquiries from the Plaintiff.

H. Defendant DeHart has admitted sexual involvement with the Plaintiff.

I. Two Conference superintendents were sent to convince Defendant DeHart to surrender his credentials voluntarily in an attempt to frustrate any accountability or embarrassment to the Conference. Defendant DeHart's surrender of credentials was labeled "honorable" in order to allow for future reinstatement.

2. Plaintiff's Amended Complaint filed February 22, 1993, asserts the following claims for relief:

A. Breach of fiduciary duty against all defendants.

B. Negligent hiring/supervision/training against Defendants Church and Conference.

C. Outrageous conduct against all defendants.

D. Vicarious liability against Church, Conference, and Sub-District.

E. Punitive damages against all defendants.

II. MOTION FOR SUMMARY JUDGMENT BASED UPON THE FIRST AMENDMENT AND LACK OF SUBJECT MATTER JURISDICTION

3. Defendant Conference filed a Motion For Summary Judgment Based Upon First Amendment and Lack of Subject Matter Jurisdiction on December 27, 1993, and Reply on January 7, 1994. Defendant Church joined in the Motion on December 28, 1993. Unauthorized supplemental pleadings were filed on January 18, 1994, by the Plaintiff and on January 24, 1994, and February 1, 1994, by Defendant Conference. The Motion sets forth the following arguments:

A. All of Plaintiff's claims against the Conference are barred by the Free Exercise Clause of the First Amendment which proscribes "any law respecting an establishment of religion, or prohibiting free exercise thereof". Consideration of these claims requires a court and/or jury to analyze the religious doctrine, ecclesiastical law, matters of government, and discipline of the church, this court lacks subject matter jurisdiction over Plaintiff's claims.

1) The claim of breach of fiduciary duty against the Conference requires a determination of the relationship between the Conference and the Plaintiff which involves an application of the teachings and principles set forth in the Book of Discipline.

2) The claims relating to negligent hiring/supervision/training involve second guessing ecclesiastical matters relating to appointing, supervising, and disciplining ministers as laid out in the Book of Discipline, a religious document.

3) Tort rules and Plaintiff's tort action constitute state action and burden the Conference's free exercise of religion.

4) Permitting punitive damages for the Plaintiff's claims would have a chilling effect upon the Conference's free exercise of religion.

4. In the Response filed December 30, 1993, to the Motion for Summary Judgment regarding the First Amendment and Lack of Subject Matter Jurisdiction, the Plaintiff argues as follows:

A. The First Amendment does not prohibit Plaintiff's claims.

1) The First Amendment does not protect religious organizations from tort liability.

2) The Plaintiff at no point has asked this court or jury to interpret church doctrine.

5. Under C.R.C.P. 56(c), summary judgment is proper only when the pleadings, affidavits, depositions, or admissions establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party. *E.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986); *Urban v. Beloit Corp.*, 711 P.2d 685 (Colo. 1985); *Ginter v. Palmer and Co.*, 196 Colo. 203, 585 P.2d 583 (1978). This burden has two distinct components: an initial burden of production on the moving party, which burden when satisfied then shifts to the non-moving party, and an ultimate burden of persuasion, which always

remains on the moving party. *See* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* 2727 (2d ed. 1983).

6. In a First Amendment challenge, the pivotal inquiry is whether the facts of the case require the interpretation or weighing of church doctrine, or the application of neutral principles of law. *Moses v. Diocese of Colorado,* 863 P.2d 310 (Colo. 1993).

7. A court may entertain claims against a religious organization consistent with the First Amendment where those claims call for the application of neutral state laws rather than for the resolution of disputed issues of religious doctrine and practice. *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440 (1968). For purposes of the foregoing statement, common law principles are part of the state law. *See Bishop & Diocese of Colorado v. Mote,* 716 P.2d 85 (Colo. 1986).

8. Plaintiff's claims for relief are all common law tort claims and do not require the Court to decide, weigh, or interpret ecclesiastical matters. Such claims have been held actionable against clergy members and their superiors when supported by competent evidence in the record. *See Moses,* supra at 321.

9. Plaintiff's claim of breach of fiduciary duty is based in common law principles. "A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advise for the benefit of another upon matters within the scope of the relation." Restatement (Second) of Torts Sec. 874, comment a (1979). "The existence of the fiduciary relationship is a question of fact the jury." *Moses,* at 322.

10. Plaintiff's claim of negligent hiring/supervision/training is based in tort law and does not ask nor require the Court to consider internal policy of the church to determine whether the Conference breached a duty to the Plaintiff.

11. The Defendant ignores the standard established in *Moses, supra* for dealing with issues of negligent supervision and hiring by a religious entity. Using agency and employment law, the Court considered whether there was an attribute of character held by the agent that created an undue risk of harm and the

anticipated degree of contact with other persons in carrying out the assigned duty.

12. Defendant Conference states in its Reply that "Plaintiff argues that she is not requesting the Court or jury to interpret church doctrine. While that may be true from the Plaintiff's perspective, the defenses raised by the Defendant will necessarily involve extensive review by the Court or jury of church doctrine and procedure." (Defendant's Reply, p.5) The Defendant cannot raise church doctrine as an issue and then demand to be dismissed because the First Amendment prohibits inquiry into church doctrine.

13. The critical inquiry in testing such claims against a constitutional challenge under the First Amendment is whether resolution of those claims require the interpretation or weighing of church doctrine as opposed to the application of neutral principles of law. *Moses,* supra. In the instant case, even accepting Defendant's statement of the facts as undisputed, the Court concludes that Defendant has not demonstrated as matter of law that Plaintiff's claims require the interpretation of its religious doctrine as opposed to the application of neutral principles of law. Assuming that to be the case, the Court is not persuaded that Plaintiff's claims constitute a challenge to the religious beliefs of doctrines of the church.

14. Defendant's pleadings fail to establish that the nonexistence of a genuine issue as to any material fact. Defendant has not exhibited as a matter of law that Plaintiff's claims require the weighing or interpretation of religious doctrine as opposed to the application of neutral principles of law.

Accordingly, the motion is denied.

III. MOTION FOR SUMMARY JUDGMENT OF DEFENDANT ROCKY MOUNTAIN CONFERENCE OF THE UNITED METHODIST CHURCH ON SPECIFIC GROUNDS AS TO VARIOUS CLAIMS ALLEGED.

Defendant Conference filed a Motion for Summary Judgment on Specific Grounds As To Various Claims Alleged on

December 17, 1993, and Reply on January 7, 1994. Defendant, First United Methodist Church of Greeley, Colorado joined in on the Motion on December 28, 1993.

15. The Motion sets forth the following arguments:

A. The Defendant, Conference never had a fiduciary relationship with Plaintiff.

B. There is insufficient evidence to support the Plaintiff's claim of negligent hiring/supervision/training.

C. There are insufficient facts as a matter of law to support plaintiff's claims for outrageous conduct against the Conference.

D. The Conference is not vicariously liable for the actions of Defendant, DeHart.

E. Punitive damages cannot be awarded without some form of liability established against the Defendant and the material facts in this case do not permit a claim for punitive damages.

16. In the Response filed December 29, 1993, to the Defendant's Conference's First Motion For Summary Judgment, the plaintiff argues as follows:

A. The Plaintiff was in a fiduciary relationship with the Conference.

B. The claim for negligent hiring and/or supervision is supported by material facts.

C. The material facts support a claim for outrageous conduct.

D. There is evidence that the Conference ratified the actions of Defendant DeHart and is therefore vicariously liable for those actions.

E. There is evidence upon which a jury could assess punitive damages against the Conference.

17. Defendant's arguments in support of the motion for summary judgment relating to: a) the existence of a fiduciary relationship between Defendant and Plaintiff; b) the sufficiency of evidence to support the Plaintiff's claims of negligent hiring/supervision/training and for outrageous conduct against Conference; c) the existence Defendant's vicarious liability for the actions of DeHart; and d) sufficiency of evidence to support a claim for punitive damages, all involve questions of facts. As to these arguments the Court must determine whether, resolving all doubts regarding the evidence in favor of the nonmoving party, the Defendant has established that there is no genuine issue of material facts. C.R.C.P. 56.

18. Plaintiff's claim for punitive damages requires that she prove beyond a reasonable doubt that the Defendant acted with evil intent or with wanton & reckless disregard of Plaintiff's rights. A genuine question of material fact is presented by the Defendant's testimony. Defendant has failed to show that there is no issue as to any material fact regarding the claim for punitive damages.

19. Defendant has not presented a set of undisputed facts. The facts presented by the Plaintiff in her response, show that Defendant's statement of facts is substantially incomplete as it relates to the issues presented. Even if all material facts regarding these issues were undisputed, which does not appear to be the case, the Court has not been presented with such facts. The Court finds that the facts offered by the Plaintiff in her responses are sufficient to withstand summary judgment on the above-listed factual issues.

20. The motion filed by the Defendant Conference is essentially the same as the Motion for Summary Judgment filed by the Defendant Church on December 8, 1993. (The Church filed an "Appendix" on February 9, 1994, to the motion which was unexplained and appears to be unauthorized.)

The motions are denied.

IV. DEFENDANT DEHART'S SECOND MOTION FOR SUMMARY JUDGMENT, RELATING TO THE OUTRAGEOUS CONDUCT CLAIM

Defendant DeHart filed his second Motion for Summary Judgment, Relating to the Outrageous Conduct Claim on December 29, 1993, and the Reply on January 27, 1994.

21. This motion sets forth the following arguments:

A. The Allegations that Defendant, DeHart had harmful or offensive contact with the Plaintiff, without her consent, would amount to allegations of battery.

B. Facts which establish a traditional intentional tort claim do not set up a claim for outrageous conduct.

C. Outrageous conduct is a gap-filler and cannot be regarded as encroaching on theories of liability already occupied by traditional intentional tort theories.

D. The operative facts on which Plaintiff relies on to establish a claim of outrageous conduct involve sexual contacts between the Plaintiff and DeHart. Such contacts would involve the traditional tort of battery, and would not establish outrageous conduct.

22. In the Response filed on January 13, 1994, to the Motion For Summary Judgment regarding Outrageous Conduct, the Plaintiff argues as follows:

A. The same claim can be, and often is, the basis for multiple claims for relief.

B. The facts support a claim for outrageous conduct against Defendant DeHart.

23. Plaintiff is not pursuing an action for assault and battery. Plaintiff's claim for outrageous conduct is based upon the existence of a fiduciary relationship between the Plaintiff and the Defendant and the conduct resulting from the breach of that relationship. Plaintiff may plead alternative claims for relief. Facts may support more than one legal theory.

24. Outrageous conduct is conduct that is so extreme in degree as to go beyond bounds of decency and can be regarded as atrocious and intolerable in a civilized community. *Montgomery Ward & Co., Inc. v. Andrews,* 736 P. 2d 40, 46. To meet the "threshold level of conduct" to state a cause of action for outrageous conduct, plaintiff must allege "defendant has engaged in a pattern of conduct that was intended to cause or recklessly did cause severe emotional distress . . .". *Simmons v. Prudential Ins. Co. of America,* 641 F. Supp. 675, 683. The facts offered by the Plaintiff in her Response support a claim of outrageous conduct.

25. Material facts relating to the allegations that Defendant DeHart had harmful or offensive contact with the Plaintiff, without her consent are at issue as evidenced by the Plaintiff's and Defendant's testimonies. Plaintiff has presented the Court with facts supporting her claim of outrageous conduct. Defendant has not presented this court with facts which show the nonexistence of an issue of material fact relating to his argument that Plaintiff's claims are claims for the intentional tort of battery.

Accordingly the Motion is denied.

V. DEFENDANT DEHART'S SECOND MOTION FOR DETERMINATION OF QUESTIONS OF LAW RELATING TO FIDUCIARY DUTY

Defendant DeHart filed the Second Motion for Determination of Questions of Law on December 29, 1993, and the Reply on January 27, 1994.

26. This motion sets forth the following arguments:

A. Defendant DeHart did not owe a fiduciary duty to the Plaintiff as a matter of law because there never was a fiduciary duty.

1) By nature, fiduciary duties arise when one person exercises control of the financial affairs of another.

2) The relationship between the Plaintiff and Defendant DeHart involved no such situation that could be characterized as a fiduciary relationship.

3) Characterizing every situation where trust and confidences are reposed in another as a "fiduciary relationship" invites broad fiduciary liability and would constitute an ill-conceived social policy.

B. Assuming that a pastoral counseling relationship may, in theory, give rise to a fiduciary duty, the existence of a fiduciary duty is still dependent on bestowal and acceptance of control, and relates only to the subject matter affected by the fiduciary duty.

1) There was no focused undertaking comparable to the one referred to in *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988), in the pastoral counseling relationship between Christa Bohrer and Defendant DeHart.

2) If there was some focused undertaking in the pastoral counseling relationship between Christa Bohrer and Defendant DeHart, any fiduciary duty would be limited to that context.

C. If it is assumed that Christa Bohrer and Defendant DeHart for some period of time had a pastoral counseling relationship which gave rise to a fiduciary duty, that fiduciary duty existed only so long as the pastoral counseling relationship existed.

1) No pastoral counseling relationship could have existed beyond August 1985, the point at which Defendant DeHart left his minister position.

2) Any pastoral counseling relationship between Defendant DeHart and Plaintiff existed for a brief period of time. At a minimum, that creates an issue of fact as to time period during which a fiduciary duty could have existed.

D. The other sources of a "fiduciary duty" suggested by the Plaintiff are insufficient to trigger a fiduciary duty.

1) Defendant Dehart's status as a minister did not establish a fiduciary relationship between himself and the Plaintiff giving rise to a fiduciary duty.

2) Defendant DeHart's status as sub-district youth coordinator did not give rise to a fiduciary duty.

3) The plaintiff's ostensible perception of Defendant DeHart as a "father figure" did not give rise to a fiduciary duty.

27. In the Response filed January 13, 1994, to Defendant DeHart's Second Motion For Determination of Questions of Law, Relating to Fiduciary Duty, the Plaintiff argues as follows:

A. The existence of a fiduciary relationship, and any fiduciary duty arising therefrom, does not, in the state of Colorado, require that there be a transfer of the control over financial affairs.

B. The fiduciary relationship and the fiduciary duty owed to Plaintiff by Defendant DeHart are not, as a matter of law, limited to the pastoral counseling setting.

C. Defendant's status is not determinative of the issue of whether he was a fiduciary to Plaintiff.

28. Under C.R.C.P. 56(h), determination of a question of law is proper only when there is no genuine issue of material fact necessary for the determination of the question of law.

29. The court determined in its review of Defendant, Conference's, Motions for Summary Judgment filed on December 28, 1993, as discussed in paragraphs nine and seventeen of this order, that the existence of a fiduciary relationship between clergy and/or its superiors and parishioner is a question of fact.

30. A fiduciary relationship does not require the exercise of control over financial affairs. *Destefano, supra* and *Moses,* supra.

31. The existence of a fiduciary relationship is not dependent on the existence of a professional relationship. *Moses,* supra, at 321. Defendant's professional status is not determinative of a fiduciary relationship.

32. The existence of a fiduciary relationship between the Plaintiff and DeHart at various times relevant to this case is an issue of material fact necessary for the determination of questions of law relating to fiduciary duty.

Accordingly, the Motion is denied.

VI. DEFENDANT DEHART'S FIRST MOTION FOR SUMMARY JUDGMENT BASED ON THE STATUTE OF LIMITATIONS

Defendant DeHart filed this Motion for Summary Judgment on December 29, 1993, and the Reply on February 10, 1994.

33. The motion sets forth the following arguments:

A. The nature of the conduct giving rise to the claims against Defendant DeHart is claimed to have involved harmful or offensive contact, involving sexual conduct, intentionally inflicted on the Plaintiff by DeHart without the Plaintiff's consent.

B. Such conduct defines the intentional tort of sexual assault.

C. Where the Plaintiff's contention is that the Defendant's conduct involved sexual assault, civil claims arising out of such alleged conduct would be governed by the one-year statute of limitations governing claims for assault and battery.

D. The statute of limitations started to run on August 2, 1988, Plaintiff's eighteenth birthday.

E. There was no tolling of the Plaintiff's claims after she turned 18, because Plaintiff was aware that she had been

injured by the sexual conduct with DeHart and that DeHart was the cause of her injury when she attained majority.

F. The statute of limitations expires on August 2, 1989.

G. This action was commenced upon the filing of the Complaint on January 25, 1993, three and a half years after the statute of limitations had run. These claims are therefore time-barred.

H. While the claims against DeHart are denominated as claims for breach of fiduciary duty and outrageous conduct, they are actually claims for assault and battery and are therefore governed by the one year statute of limitations.

I. A claim for punitive damages is not a separate free-standing claim, therefore if the Plaintiff's claims for actual damages is determined to be time-barred, there are no circumstances which would entitle her to punitive damages.

34. In the Response filed January 28, 1994, to the Motion for Summary Judgment, Based on the Statute of Limitations, the Plaintiff argues as follows:

A. The nature of Plaintiff's claim is a breach of trust.

B. The three year statute of limitations applicable to breach of fiduciary duty claims, C.R.S., section 13-80-101(f), applies to Plaintiff's first claim for relief against DeHart. Her claim had not run as of July 1, 1990, and her claim is timely under section 13-80-103.7 C.R.S.

C. Outrageous conduct is governed by the two year statute of limitations set forth at section 13-80-102(a), C.R.S. The Plaintiff had until her eighteenth birthday on August 2, 1990, to file her claim. Hence, the claim was not barred as of July 1, 1990, and is therefore, timely under the six year statute contained in C.R.S. section 13-80-103.7 (1987 Repl. Vol. 6A) (1992 Cum. Supp.).

35. This motion is repetitive. This court in its order dated September 2, 1993, stated that whether a particular statute of

limitations is applicable is determined by the nature of the right sued on and not by the form of action or the relief demanded. *Richards Engineers, Inc. v. Spanel*, 745 P.2d 1031, 1034 (Colo. App. 1987); *Association of Owners, Satellite Apt., Inc., v. Otte,* 550 P.2d 894, 896 (Colo. App. 1976). Plaintiff's claims have been consistently based upon the breach of a fiduciary duty. The evidence in the Response remains consistent in supporting this bases.

36. C.R.S. section 13-80-103.7(4), 1992 Cum. Supp. (1987 Repl. Vol. 6A) extends the statute of limitations as to civil actions based on offenses as described in section (1) of this section for which the applicable statute of limitations in effect prior to July 1, 1990, has not yet run on July 1, 1990. This court has previously stated in its Order of September 2, 1993, that 13-180-103.7 was the statute in effect when the Plaintiff filed her Complaint on January 25, 1993.

37. Once again, the Defendant filed an unauthorized Supplement with additional argument.

Accordingly the motion is denied.

VII. REQUEST FOR ORAL ARGUMENT

38. Oral argument is not necessary and would not be helpful to the Court.

Done this 15th day of February, 1994.

BY THE COURT

CONNIE L. PETERSON
DISTRICT JUDGE

Copies mailed to
counsel 2/15/94

APPENDIX H

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April 28, 1994

BY FEDERAL EXPRESS

Neil Quigley
Quigley & Bruce
1010 Cherry Tower
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Denver, CO 80222

RE: Diocese of Colorado v. Moses, No. 93-1678

Dear Mr. Quigley:

On behalf of petitioners in the above case, I hereby consent to the filing of an *amicus* brief in the United States Supreme Court by the Bear Valley Church of Christ and the Rocky Mountain Conference of the United Methodist Church.

Sincerely,

H. Bartow Farr, III

HBR:tj

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No. 93-1578

In The

Supreme Court of the United States

October Term, 1993

THE DIOCESE OF COLORADO, a Colorado corporation, and BISHOP WILLIAM FREY,

Petitioners,

vs.

MARY E. MOSES, n/k/a MARY ELAINE TENANTRY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado Case No. 92SA415

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act ("RFRA") should be applied retroactively to a common-law tort action that has been tried to judgment and reviewed by the highest state court prior to the enactment of RFRA, when the state court held only that application of common law to the petitioners' "secular conduct" does not burden the free exercise of religion and no record evidence indicates that the petitioners' tortious conduct was rooted in any religious belief.

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A. The Colorado Supreme Court followed well-settled decisions of this Court in holding that legal restriction of "secular conduct" not proven to be rooted in religious belief does not burden the free exercise of religion 5

B. Because the Diocese and the Bishop have never presented record evidence concerning how their tortious conduct was required by any sincerely held religious belief, this case presents no important or unsettled federal question concerning the "actual impact" of tort liability on religious beliefs 10

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OPINION BELOW

The opinion of the Colorado Supreme Court (pet. app. A) affirming a jury verdict in favor of the respondent is reported at 863 P.2d 310.

JURISDICTION

The petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

The respondent Mary E. Moses, n/k/a Mary Tenantry ("Tenantry"), filed suit against the Episcopal Diocese of Colorado ("the Diocese"), the Bishop of the Diocese, William Frey ("the Bishop"), and Father Paul Robinson, an Episcopalian priest ("Robinson" or "the priest"). Her claims included breach of fiduciary duty and negligent hiring and supervision based on the priest's sexual relationship with Tenantry that developed during pastoral counseling and the response of the Diocese and the Bishop to the relationship. Tenantry had a history of severe mental illness, and the tortious conduct of the Bishop and the Diocese caused Tenantry again to become mentally ill. The jury returned a verdict of $728,100 for Tenantry on her breach of fiduciary duty and negligence claims.[1]

[1] The jury returned a $488,400 verdict for Tenantry on her claim that the Diocese and the Bishop were vicariously liable for

The facts underlying Tenantry's claims are recounted in the opinion of the Colorado Supreme Court. Pet. app. A at 1a-12a. Tenantry incorporates those facts by reference. \

The Colorado Supreme Court determined that the evidence at trial was sufficient to support Tenantry's claims for breach of fiduciary duty and negligence in hiring and supervision. The Diocese and the Bishop argued for the first time on appeal that the First Amendment barred tort liability in this case. As the Colorado Supreme Court noted, "[t]he defendants did not argue at trial that the First Amendment forbids [the tort claims in this case]." Pet. app. A at 12a, n.10.[2] Further, the Colorado Supreme Court noted that "[t]he defendants' only argument at trial regarding the First Amendment was [that] it barred admission of two pamphlets that described the hierarchical structure of the Episcopal Church." *Id.*

The Colorado Supreme Court recognized that it need not address the First Amendment defense of the Diocese

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the priest's conduct. The Colorado Supreme Court overturned this portion of the verdict on the ground that the Diocese and the Bishop were not vicariously liable because there was insufficient evidence that the priest was acting within the scope of his employment when he engaged in a sexual relationship with Tenantry. Pet. app. A at 2a-3a.

[2] The Diocese and the Bishop did not assert at trial that Robinson's sexual relationship with Tenantry, the Diocese's failure to provide the parish with Robinson's pre-ordination psychological reports, the Bishop's insistence on Tenantry's silence concerning the priest's sexual conduct, and the Bishop's protection of a priest while disregarding the interests of a parishioner were tenets of the Episcopalian faith protected by the First Amendment.

and the Bishop. Pet. app. A at 12a. However, the court exercised its discretion to address *one* First Amendment argument raised by the Diocese and the Bishop, the argument that Tenantry's tort claims required resolution of disputes over religious doctrine, in violation of this Court's decision in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440 (1969). The Colorado Supreme Court held that this case did not require any prohibited resolution of disputes over religious doctrine because, as required by *Presbyterian Church* and other decisions of this Court, this case could be resolved by reference to "neutral principles of law." Pet. app. A at 15a-17a.

The Colorado Supreme Court noted parenthetically in a string citation that, in *Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990), this Court had held that "even religiously motivated conduct is not immune from neutral laws of general applicability." Pet. app. A at 16a. However, contrary to the suggestion in the Diocese's and the Bishop's brief, pet. app. A at 5, the court did not rely on this holding in *Smith* concerning "religiously motivated conduct" but rather on a narrower holding that "[a]pplication of a secular standard to *secular conduct* is not prohibited by the Constitution." Pet. app. A at 16a (emphasis added).

REASONS FOR DENYING THE PETITION

I. Regardless of whether RFRA applies to this case, this case is not worthy of certiorari review because the Colorado Supreme Court's holding is consistent with this Court's well-established precedents, RFRA, and the decisions of all state and lower federal courts.

Assuming *arguendo* that the Religious Freedom Restoration Act ("RFRA"), P.L. 103-141, 107 Stat. 1488 (1993), should be applied retroactively to this case, the decision of the Colorado Supreme Court in this case is consistent with RFRA and raises no unsettled issue of federal law. The Colorado court followed well-settled decisions of this Court in holding that laws burdening conduct not proven to be rooted in religious belief do not violate the First Amendment's free exercise clause.

The Diocese and the Bishop cannot argue that the Colorado Supreme Court ought to have examined evidence concerning the actual impact of tort liability on the Diocese's and the Bishop's religious beliefs: such weighing of evidence in this case is impossible because the Diocese and the Bishop did not present evidence showing whether and how their tortious conduct was required by their religious beliefs. Moreover, nothing in the Colorado court decision relied on *Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). Therefore, the opinion of the Colorado Supreme Court is completely consistent with RFRA.

A. The Colorado Supreme Court followed well-settled decisions of this Court in holding that legal restriction of "secular conduct" not proven to be rooted in religious belief does not burden the free exercise of religion.

The Diocese and the Bishop have never provided record evidence or even specific allegations showing that their tortious conduct was rooted in any religious belief. Based on this record, the Colorado Supreme Court applied well-settled law to hold that, because the Diocese's and the Bishop's tortious conduct was "secular conduct" that was not rooted in religious belief, the judgment in this case did not burden the free exercise of religion. This holding is consistent with RFRA and with every decision by this Court, lower federal courts, and other state courts. It also raises no important or unsettled principle of constitutional law. Therefore, this Court should deny the Diocese's and the Bishop's petition. Sup. Ct. R. 10.1.

Congress enacted RFRA in response to this Court's decision in *Smith*, 494 U.S. 872. In *Smith*, this Court held that the free exercise clause does not bar states from enforcing generally applicable, religiously neutral rules to prohibit or burden even religiously motivated conduct, such as the use of peyote in religious ceremonies. Believing that laws might undesirably burden important religious liberties even if the laws were general and religiously neutral, Congress enacted RFRA to codify the free exercise jurisprudence in cases decided prior to

Smith. *See* S. Rep. No. 103-111, 103rd Cong., 1st Sess. at 8-9, *reprinted in* 1994 U.S.C.C.A.N. 1892, 1904.[3]

Therefore, RFRA restricts state and federal law only if the law "substantially burden[s] a person's *exercise of religion*." Pet. app. F at 60a (emphasis added). This Court has long held that conduct is not "exercise of religion" unless the conduct is mandated by sincerely held religious beliefs. *See, e.g., Frazee v. Employment Security Dep't*, 489 U.S. 829, 834 (1989) (to prove violation of free exercise clause, litigant must show that burdened conduct "was based on a sincerely held religious belief"); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) (law does not burden free exercise rights unless it has "tendency to coerce [the Diocese and the Bishop] into acting contrary to their religious beliefs"); *Hobbie v. Unemployment Appeals Com'n*, 480 U.S. 136, 141 (1987) (burdened conduct must be "mandated by religious belief" to be protected by free exercise clause) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981)); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("to have protection of the Religion Clauses, claims must be rooted in religious beliefs"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

Moreover, mere assertion that a law burdens some practices that might *conceivably* be religious has never

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[3] Specifically, section 3 of RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the application of the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." Pet. app. F at 60a.

sufficed to show a violation of the free exercise clause. The party asserting a defense based on the free exercise clause has the burden to show with record evidence that his or her conduct is mandated by a sincere religious belief. *Yoder*, 406 U.S. at 215. *See also Messiah Baptist Church v. County of Jefferson, Colorado*, 859 F.2d 820, 824 (10th Cir. 1988) (free exercise clause challenge to zoning ordinance requires "evidence in the record" that location of church "is integrally related to underlying religious beliefs").

Therefore, under both RFRA and all of this Court's well-established free exercise precedents, there is no defense to tort liability unless the specific tortious acts were actually "mandated by religious belief." *Hobbie*, 480 U.S. at 141 (quoting *Thomas*, 450 U.S. at 717-18). The Diocese and the Bishop have the burden of proving with record evidence that their tortious conduct and religious belief are "inseparable and interdependent." *Yoder*, 406 U.S. at 215.

Because the Diocese and the Bishop have not alleged – let alone proven – that their specific tortious acts were "mandated" by their Episcopalian religious faith, they have not properly alleged any defense to tort liability under either the First Amendment or RFRA. Specifically, the Diocese and the Bishop have never argued at trial or in any of their briefs that their Episcopalian religious faith requires them to (1) hire priests suffering from depression, low self-esteem, and sexual identification ambiguity and authorize such priests to provide counseling to psychologically vulnerable parishioners; (2) allow

such priests to engage in oral sex with parishioners during the course of counseling; (3) demand that the parishioner be silent about the priest's sexual misconduct; or (4) assume a duty to act in the best interests of the parishioner and later breach this duty to protect the Diocese or the career of the priest.[4]

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[4] The briefs of two *amici curiae* assert, without citation to the record, that the Bishop's conduct was rooted in religious belief or practice. The brief of the American Association of Pastoral Counselors ("AAPC"), for instance, states that Tenantry sought religious counsel and that tort liability in this case was related to "the efficacy of the *religious* counsel the bishop provided in response to respondent's request." Brief of *amicus curiae* AAPC at 4, n.3 (emphasis added). The AAPC also asserts, again without citation, that the Bishop was held liable for "fail[ure] to provide [Tenantry] with the service of forgiveness." *Id.* at 5, n.3. The brief filed by the *amicus curiae* Colorado Catholic Conference ("CCC") and others makes the assertions that the Diocese and the Bishop were held liable for "negligent ordination," brief of *amicus curiae* CCC *et al.* at 8, and conducting a "confession [that was] unlawful." *Id.* at 7.

These assertions misrepresent the record and the basis for liability in this case. It is incorrect to state that Tenantry requested the meeting with the Bishop for religious counseling: the record indicates that the *Bishop* asked Tenantry's husband to ask Tenantry to meet with him to discuss Father Robinson's misconduct. Tr. VIII: 116. The Diocese and the Bishop were not held liable for "negligent ordination" or failure to provide some "service of forgiveness" or "unlawful confession." They were held liable for failure to provide the Diocese's personnel file on Father Robinson to the parish and for making no effort to assist Tenantry, despite their knowledge of Tenantry's "extreme vulnerability," pet. app. A at 21a, except to insist that Tenantry not disclose Father Robinson's misconduct. Pet. app. A at 22a.

The Diocese and the Bishop never argued at trial that the failure to provide Father Robinson's file to the parish was a sincere requirement of Episcopalian ordination. Likewise, the

Because of this lack of proof, the Colorado Supreme Court properly found that the Diocese's and the Bishop's First Amendment defense was meritless. The Colorado Supreme Court held that "[a]pplication of a secular standard *to secular conduct* that is tortious is not prohibited by the Constitution." Pet. app. A at 16a (emphasis added). In

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Diocese and the Bishop never argued at trial that the Bishop's insistence on Tenantry's silence and his failure to provide any other help to Tenantry was sincere "religious counsel" required by the Episcopal Church's doctrines or practices. Rather, the Bishop testified that he asked for such silence to protect Father Robinson and avoid a "scandal" by insuring that his misconduct did not "become public knowledge" through "gossip." Tr. VIII: 123, 153. The Bishop also did not mention any religious doctrine or belief in explaining why he did not provide Tenantry with any secular assistance, such as referral to a psychiatrist. Tr. VIII: 125-26, 164-65.

The suggestion that these tortious acts and omissions were sincere religious practices is a *post hoc* rationalization made for the first time on appeal and, therefore, lacking any support in the record. The Diocese and the Bishop, however, have the burden of proving that their tortious conduct was rooted in a sincere religious belief with record evidence. *Yoder*, 406 U.S. at 209-16 (reviewing expert testimony and other record evidence before concluding that Amish's educational practices and religious beliefs were "inseparable and interdependent"). They cannot do so with the unsupported assertions of *amici*. Moreover, this Court must ignore such factual assertions that are based on matters outside the record. *Adickes v. Kress & Co.*, 398 U.S. 144, 157-58 n.16 (1970); *Russell v. Southard*, 12 How. (53 U.S.) 139, 158-59 (1851) ("This court must affirm or reverse upon the case as it appears in the record").

other words, the Colorado Supreme Court determined that the burdens imposed by tort liability in this case had not been shown to be burdens on anything but *secular* conduct.

This holding is consistent with every decision of this Court, all lower federal courts, and all state courts. It presents no unsettled or important question of federal law. Therefore, the petition of the Diocese and the Bishop should be denied.

B. Because the Diocese and the Bishop have never presented record evidence concerning how their tortious conduct was required by any sincerely held religious belief, this case presents no important or unsettled federal question concerning the "actual impact" of tort liability on religious beliefs.

The Bishop and the Diocese repeatedly state that the Colorado Supreme Court "undertook no analysis of the actual impact of the tort claims on petitioners' exercise of religious functions." Pet. at 5. According to the Diocese and the Bishop, the Colorado Supreme Court erred because it ruled against the Diocese's and the Bishop's free exercise defense "without even considering the extent of such a burden or the State's justification for imposing that burden." Pet. at 6.

The record in this case, however, does not permit any "analysis of the *actual* impact of the tort claims on petitioners' exercise of religious functions." Pet. at 5 (emphasis added). The Diocese and the Bishop declined to raise their free exercise defense to liability at trial.

They did not present evidence suggesting that their tortious conduct had some relation to religious beliefs. They raised their First Amendment defense for the first time on appeal to the Colorado Supreme Court as an abstract, hypothetical claim unsupported by record evidence.

Therefore, the petition should be denied because this case raises no unsettled or important issue of federal law regarding the impact of tort liability on religious beliefs. Lacking a record on which to assess such impact, the Colorado Supreme Court properly addressed the Diocese's and the Bishop's free exercise defense as an abstract matter of general constitutional law, holding that "[a]pplication of a secular standard to secular conduct that is tortious is not prohibited by the Constitution," pet. app. A at 16a, and that "[t]he First Amendment to the United States Constitution does not grant religious organizations absolute immunity from tort liability," pet. app. A at 13a.

These general holdings are well-established and uncontroversial principles of constitutional law. The Colorado Supreme Court cannot be faulted for failing to examine in greater detail the actual burden on the Diocese's and the Bishop's specific religious practices because the factual record needed for such an examination does not exist in this case.

Free exercise defenses to common-law liability are necessarily dependent on specific facts developed at trial. *Yoder*, 406 U.S. at 215. The determination of the nature and especially the sincerity of an allegedly religious belief and the relation of such a belief to tortious conduct requires assessment of credibility and determinations of

fact by the trial court. The Diocese and the Bishop waived the presentation of such evidence. They cannot now argue that the Colorado Supreme Court should have considered evidence that does not exist because of their own inaction.[5]

C. The decision below raises no important or unsettled federal question concerning the application of RFRA because the Colorado Supreme Court did not rely on this Court's holding in *Employment Division, Dep't of Human Resources v. Smith* and did not hold that generally applicable laws are immune from scrutiny under the free exercise clause.

The Diocese and the Bishop repeatedly assert, without any citation to the Colorado Supreme Court's decision, that the court rested its opinion "entirely on the basis of *Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990)." Pet. at (i). According to the Diocese and the Bishop, the Colorado Supreme Court endorsed the theory that "tort judgments in this case are immune from constitutional scrutiny as the mere application of neutral, general rules." Pet. at 12.

These statements are distortions of the Colorado Supreme Court opinion, designed to concoct an important federal question from this otherwise uncontroversial

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[5] The Diocese and the Bishop cannot contend that they were unable to present their First Amendment defense until after the enactment of RFRA. Their statements in their petition before this Court contradict such a contention. According to the Bishop and the Diocese, their First Amendment defense does not depend on RFRA. Pet. at 7-8.

case by suggesting a conflict between the opinion and RFRA. The opinion, however, is completely consistent with RFRA and does not rely on this Court's decision in *Smith*. Therefore, the Diocese's and the Bishop's petition should be denied because this case raises no important or unsettled question regarding the application of RFRA. Sup. Ct. R. 10.1(c).

Nowhere does the Colorado Supreme Court hold "that this case was controlled by [*Smith*]." Pet. at 12. To the contrary, the court cited *Smith* in passing only once, in a string citation to other authorities. Pet. app. A at 16a. The opinion does not discuss *Smith*, and it does not rely on *Smith*'s holding that generally applicable, religiously neutral laws never unconstitutionally burden the free exercise of religion. The Colorado court does not state or imply that generally applicable common-law rules are "immune from constitutional scrutiny," as the Diocese and the Bishop suggest. The court holds only that tort liability in *this* case had not been shown to burden the Diocese's and the Bishop's free exercise of religion.

The opinion includes a statement that "[b]ecause . . . neutral principles of law can be applied, the First Amendment is not a defense against Tenantry's claim." Pet. app. A at 17a. However, understood in the context of this case, this statement has nothing to do with *Smith* and does not hold that tort liability can always be imposed for conduct arising from genuine religious belief.

In their briefs to the Colorado Supreme Court, the Diocese and the Bishop relied on this Court's decisions holding that courts must resolve disputes over church property "without resolving the underlying controversies

over religious doctrine." *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450 (1969). *See also Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). *See also* Laurence Tribe, *American Constitutional Law* § 14-11, at 1233-42 (2d ed. 1988). In order to determine title to church property, these cases hold that courts must rely on "neutral principles of law, developed for use in all property disputes." *Presbyterian Church*, 393 U.S. at 449.

In rejecting the argument of the Diocese and the Bishop, the Colorado Supreme Court correctly held that this case did not "require interpreting and weighing [of] church doctrine" but rather allowed application of "neutral principles of law" to determine the liability of the Diocese and the Bishop. Therefore, the Colorado court held that the tort judgment in this case is consistent with this Court's jurisprudence in *Presbyterian Church*, *Jones*, *Serbian Orthodox Diocese*, and *Watson* because this case does not require the trial court to resolve controversies over religious doctrine. The court was applying the "neutral principles" doctrine explained by this Court in *Presbyterian Church*. Pet. app. A at 15a. Nothing in this uncontroversial holding has anything to do with *Smith* or implies that "tort judgments . . . are immune from constitutional scrutiny" because they are based on general, religiously neutral principles of law. Pet. at 12.

In short, the Colorado Supreme Court's decision presents no important, unsettled, or disputed issue of law. The court held that common-law liability for secular conduct does not burden the free exercise of religion. This uncontroversial proposition is consistent with this Court's pre-*Smith* jurisprudence and RFRA. Under the

considerations governing review on writ of certiorari contained in Sup. Ct. R. 10.1, this Court should deny the petition of the Diocese and the Bishop as lacking an important federal question over which there has been any dispute among state or federal courts.[6]

II. Under this Court's well-settled precedents, RFRA should not be applied retroactively to this case.

The Religious Freedom Restoration Act, P.L. 103-141, 107 Stat. 1488 (1993), was enacted on November 16, 1993, one day after the Colorado Supreme Court issued its decision in the instant case. The Diocese and the Bishop request that this Court vacate a decision affirming a judgment reached after a ten-day trial and remand this case for determination of whether RFRA should apply retroactively to this case even though this case was tried to judgment, appealed, and decided by the Colorado Supreme Court prior to the enactment of RFRA.

This Court's well-settled precedents concerning retroactivity dictate that RFRA not be applied retroactively

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[6] The Diocese and the Bishop suggest that this case involves a claim of "clergy malpractice." Pet. at 11-12. This suggestion is incorrect. Colorado does not recognize an action for clergy malpractice. *DeStefano v. Grabrian*, 763 P.2d 275, 285 (Colo. 1988). Moreover, Tenantry never pled any claim for clergy malpractice. Finally, the Colorado Supreme Court's holding concerned "secular conduct." Pet. app. A at 16a. As the Colorado Supreme Court explained, this case does not involve any dispute over Father Robinson's or Bishop Frey's conformity to any religious doctrines or religious standards of conduct. Pet. app. A at 17a, n. 13. Therefore, issues of clergy malpractice are irrelevant to this case.

to this case. There is no indication in either the language or legislative history of RFRA that Congress intended to extend RFRA's application retroactively to overturn judgments entered prior to the statute's enactment. Absent such clearly expressed Congressional intent, the traditional presumption is that RFRA applies prospectively only. Because there is no important or unsettled federal question regarding the retroactivity of RFRA, this Court should deny the Diocese's and the Bishop's petition. Sup. Ct. R. 10.1(c).

A. Nothing in section 6 of RFRA indicates a Congressional intent to apply RFRA to cases that have been tried to judgment before the statute's enactment.

In determining retroactive application of RFRA, the first question to be addressed is the language of the statute. *Landgraf v. U.S.I. Film Products*, 62 U.S.L.W. 4255, 4265 (April 26, 1994); *Kaiser Aluminum v. Bonjorno*, 494 U.S. 827, 837 (1990). The Diocese and the Bishop argue that section 6 of RFRA indicates that Congress intended RFRA to be applied retroactively to judgments entered prior to the statute's enactment. However, the statutory language and legislative history of section 6 reflect no such intent.

Section 6 provides that:

> [t]his Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

Without citing any authority, the Diocese and the Bishop contend that "the effort to prosecute and collect a tort judgment under state law is plainly 'an implementation of that law,' and thus is subject to the terms of the Act at any time prior to final judgment."

Contrary to the novel construction of the term "implementation" offered by the Diocese and the Bishop, "implementation" does not refer to judgments entered by a court of law. Rather, "implementation" refers to *administrative agencies'* promulgation of regulations, rules, or other general policy statements to carry out the purposes of a statute. This interpretation of the term "implementation" to mean "regulation by an administrative agency" reflects Congress' traditional use of the term "implementation."[7]

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[7] *See, e.g.*, 5 U.S.C. § 551(4) (" 'rule' means the whole or part of an agency statement of general or particular applicability and future effect designed to *implement* . . . law or policy"); 5 U.S.C. § 552b(g) ("Each agency . . . shall . . . promulgate regulations to *implement* the requirements of . . . this section"); 7 U.S.C. § 3603 ("agencies shall issue such regulations as they determine are necessary to *implement* this Act"); 12 U.S.C. § 1823(j)(3) ("Federal banking agency shall issue regulations *implementing* this subsection"); 15 U.S.C. § 2512(c)(2) ("Administrator . . . shall *implement* . . . the evaluation program by promulgating . . . regulations"); 16 U.S.C. § 2436 ("The Secretary of Commerce . . . shall promulgate such regulations as are necessary and appropriate to *implement* the provisions of this title"); 33 U.S.C. § 1288(j)(7) ("The Secretary . . . shall . . . promulgate regulations . . . for *implementation* of this subsection"); 42 U.S.C. § 7410(a) (requiring that "[e]ach State shall . . . adopt and submit to the Administrator . . . a plan which provides for the *implementation* of [ambient air quality standard]") (emphasis added to all statutes listed above).

Judgments are very different from regulatory "implementations." Unlike administrative regulations, judgments entered by a court of law are not rules generally applicable to persons at large: judgments govern only the specific parties to an action and their proxies.

Because "the ordinary and obvious meaning of [a] phrase is not to be lightly discounted," *I.N.S. v. Cardozo-Fonseca*, 480 U.S. 421, 431 (1987), the phrase "implementation of . . . law" should be construed to refer to administrative regulation, not judgments from courts. Congress' plain intent in including section 6 of RFRA was to insure that RFRA would apply to administrative agencies' regulations just as it applies to statutes. Nothing in the language of section 6 suggests that Congress intended to extend RFRA's application to judgments entered before RFRA's effective date.

The legislative history of RFRA also indicates no Congressional intent to extend RFRA's application to judgments entered prior to its enactment. According to the section-by-section analysis of RFRA in the Senate Judiciary Committee Report,

> [Section 6] states that the act applies to all existing State and Federal *laws*, and to all such *laws* enacted in the future. It also provides that authority it confers on the government should not be construed to permit any government to burden any religious belief.

S. Rep. No. 103-111, 103rd Cong., 1st Sess. at 8-9, *reprinted in* 1994 U.S.C.C.A.N. 1892, 1905 (emphasis added). Judgments are not "laws": unlike "laws," judgments govern

only the parties to the litigation or their proxies. Therefore, the Senate Report, like the statutory language, indicates that section 6 was not intended to apply RFRA retroactively to judgments entered prior to its enactment.

B. Because there is no clear Congressional command to apply RFRA retroactively, RFRA should be construed not to apply to this case, which was tried to judgment prior to the statute's enactment.

As explained above, there is no clearly expressed Congressional intent to apply RFRA retroactively to cases tried and decided prior to its enactment. Absent such clearly expressed intent, this Court applies the traditional presumption that statutes should not be given retroactive effect. *Landgraf*, 62 U.S.L.W. at 4266; *Kaiser Aluminum*, 494 U.S. at 841 (Scalia, J., concurring) ("absent specific indication to the contrary, the operation of nonpenal legislation is prospective only"); *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) ("[r]etroactivity is not favored in the law. Thus, congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result"); *United States v. Security Industrial Bank*, 459 U.S. 70, 78 (1982) ("The principle that statutes operate only prospectively . . . is familiar to every law student").

As this Court recently stated in *Landgraf*, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 62 U.S.L.W. at 4261. Guided by this ancient presumption, this Court

"ha[s] declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent." *Id.* at 4263.

Applying this well-settled presumption, this Court should abstain from applying RFRA here because RFRA "would have genuinely 'retroactive' effect" if it were applied to this case. *Landgraf*, 62 U.S.L.W. at 4265. By changing the scope of religious immunity from secular law, RFRA affects Tenantry's substantive private right to recover compensatory damages for injuries resulting from the tortious conduct of the Diocese and the Bishop.[8] Therefore, RFRA should not be applied retroactively "absent clear congressional intent favoring such a result." *Landgraf*, 62 U.S.L.W. at 4266. Because there is no such clearly expressed intent, the Diocese's and the Bishop's petition should be denied.

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[8] RFRA's application to this case does not involve (1) rules of procedure; (2) the availability of *prospective* injunctive relief; and (3) the jurisdiction of courts and other tribunals. Such statutes may sometimes be applied retroactively even absent specific legislative authorization. *Landgraf*, 62 U.S.L.W. at 4264-65; *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969).

CONCLUSION

Congress did not intend RFRA to be applied to judgments entered before the statute's enactment. Moreover, assuming *arguendo* that RFRA applies retroactively to this case, the Colorado Supreme Court's decision correctly applied the legal standards codified in RFRA by applying uncontroversial, universally accepted principles of constitutional law. Therefore, the Court should deny the petition of the Diocese and the Bishop.

Respectfully submitted,

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No. 93-1578

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE DIOCESE OF COLORADO, A COLORADO CORPORATION, and BISHOP WILLIAM FREY,
Petitioners,

v.

MARY E. MOSES, n/k/a MARY ELAINE TENANTRY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent's efforts to explain or justify the Colorado Supreme Court's refusal to apply the Religious Freedom Restoration Act (RFRA) in this case are unavailing. Her claim that the Act, if applied, would not have made a difference in the outcome reflects a misreading of both the Colorado Supreme Court's opinion and the substantive requirements of the Act. And respondent is equally incorrect when she asserts, based on her analysis of the statutory language and this Court's recent decision in *Landgraf v. U.S.I. Film Prods.*, 62 U.S.L.W. 4255 (April 26, 1994) (No. 92-757), that it is plain that the Act does not apply to cases that were pending when it was enacted.

1. It is important, at the outset, to be clear about the nature of petitioners' constitutional claim in this case. Petitioners contend that the First Amendment places lim-

its on the power of the state to regulate—by statute or by common law—the activities of religious personnel engaged in counseling parishioners or selecting, assigning, and supervising priests. These functions, we contend, are inextricably linked with religious perspectives, and a jury can only judge their performance in a given case by (1) ignoring the religious context and forcing religious institutions and personnel to live by secular standards or (2) assessing the defendants' conduct in light of the defendants' own religious principles. As numerous lower courts have recognized in cases involving analogous claims of "clergy malpractice," *see* Pet. 11, *either* approach threatens an undue governmental intrusion into the religious realm.

The Colorado Supreme Court flatly rejected this argument, and did so without even examining the extent of any burden on religion.[1] It held that tort claims may be pursued against a diocese and its clergy as long as (1) they do not require the court to take sides in disputes over church doctrine, and (2) "neutral principles of law can be applied." Pet. App. 17a. And it reached this conclusion based on a line of cases culminating in *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990), *see* Pet. App. 13a-16a—the decision that Congress specifically addressed in RFRA.

It thus is utterly clear that, if the new statute had been applied in this case, the Colorado Supreme Court would have undertaken an entirely different analysis. First, the court would have had to determine whether respondent's tort claims had created burdens on the free exercise of religion. If it determined that they did, then it would

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[1] Respondent faults petitioners for not introducing evidence to prove a burden on their religious exercise. Br. in Opp. at 10-11. But the Colorado Supreme Court gave no indication that it was rejecting petitioners' constitutional argument because of a lack of evidence. Rather, as we discuss in the text, it found no basis for applying the First Amendment to the implementation of general laws.

have had to decide whether the State had a compelling interest justifying those burdens. *See* RFRA § 3 (Pet. App. 60a). In this analysis, it would have been irrelevant that the burdens could be characterized as the "incidental" effects of generally applicable, "neutral" tort doctrine.

Respondent attempts to avoid this conclusion, arguing that there was no need to reach the RFRA issue in this case because the conduct burdened here was "secular." In her view, the only conduct of religious institutions that qualifies for protection (statutory or constitutional) is conduct that is specifically mandated by a religious tenet. Everything else, she claims, is "secular" and therefore subject to *any* form of governmental interference or prohibition, because such regulation would not constitute a burden on religious exercise.

This argument is plainly wrong. There are, in fact, a myriad of ways in which the government can impose burdens on religious exercise, beyond simply prohibiting conduct required by a religious tenet. Thus, for example, if a state legislature were to bar persons with particular psychological profiles from becoming members of the clergy, or to regulate the supervisory relationship between bishops and priests, or to establish guidelines for the conduct of pastoral counseling sessions, the burdens on religious activity would be clear—and those regulations would be subject to scrutiny under the First Amendment even if a particular denomination could not point to conflicts with its specific teachings. *See generally* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right of Church Autonomy*, 81 Colum. L. Rev. 1373 (1981). The same is true here, where the determinations of the jury set standards with regard to the hiring and supervision of clergy and the counseling of parishioners.

Nor did the Colorado Supreme Court hold that the activities here were all "secular" in nature. The court did note that "[a]pplication of a secular standard to sec-

ular conduct that is tortious is not prohibited by the Constitution," Pet. App. 16a, but this statement had an entirely different meaning than that attributed to it by respondent. What the court did (in circular fashion) was to define "secular conduct" as any conduct falling within the scope of generally applicable "neutral principles" of law. In other words, in stating that "secular conduct" is subject to secular regulation, the court was merely rephrasing the holding of *Smith* that the First Amendment provides no defense against application of general laws, regardless of the religious context in which the conduct may occur. It is this reasoning, in turn, that must be rejected if RFRA applies in this case.

2. Respondent also errs in arguing that RFRA plainly is inapplicable to pending cases. In fact, there are strong arguments for applying RFRA to all pending cases, based on the statutory language and the recent *Landgraf* decision of this Court.

To begin with, respondent has not succeeded in explaining away the extraordinarily broad language of section 6 of RFRA, which states that "[t]his Act applies to *all* Federal and State law, *and the implementation of that law, whether statutory or otherwise*, and whether adopted before or after the enactment of this Act." Pet. App. 61a (emphasis added). This provision makes plain that RFRA applies both to statutory and to common law, as well as to anything that constitutes the "implementation" of such law. Respondent argues that laws are only "implemented" by administrative agencies. Br. in Opp. 17-18. In fact, however, it would be far more natural to conclude that a state court applying state law in a pending case is "implementing" state law every bit as much as an administrative agency is doing in promulgating or applying a regulation.[2] If so, of course, the statute would apply to pending cases.

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[2] Moreover, respondent's reading leaves open the question whether RFRA would apply to administrative adjudications that were pend-

Plain language providing for retroactivity fully rebuts the presumption against retroactive application of statutes, recognized recently in *Landgraf*. But even if the Act were read as ambiguous on this score, there would still be a substantial argument favoring its application in this case. By its very nature, RFRA is a statute that removes burdens imposed by government on religious activities. There is every reason, even in the absence of express congressional direction, to read this statute as requiring cessation of continued prosecution of pending court actions brought by state governments based on state laws that are now preempted. *See Landgraf*, 62 U.S.L.W. at 4264 & n.30 (discussing *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969)) (retroactivity is generally favored where a statutory change is aimed at protecting constitutional rights, where application of the new statute avoids a constitutional issue, or where the government is replacing a more restrictive rule with a more generous one).[3]

If that approach is accepted, the only remaining question is whether it makes sense to draw a distinction between pending cases brought by the government and tort cases like this one—merely because application of the statute here would affect the ability of a private party to recover tort damages. In the end, given the fact that recovery of damages in the future will be barred, it seems more reasonable to conclude that Congress intended the new standard to apply in all pending cases where burdens were being imposed on the free exercise of religion, regardless of whether the opposing party is the government or someone else.

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ing when the statute was passed. If so, it is difficult to see how there would be a different result in cases pending in court.

[3] Thus, for example, there is no reason to believe that Congress would have wanted states to be able to avoid meeting the RFRA compelling-interest standard in criminal prosecutions for sacramental use of peyote that were pending when the Act was passed.

At a minimum, there can be no doubt that there is a substantial argument in favor of application of RFRA in this case. What petitioners ask is the opportunity to have that issue decided where it should have been decided before: in the Colorado Supreme Court.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the decision below, and remand this case for reconsideration in light of the Religious Freedom Restoration Act and the decision of this Court in *Landgraf v. U.S.I. Film Prods.*

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